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No. 79-1124

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1979

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, People of the State of Illinois (William J. Scott, Attorney General), Illinois Commerce Commission, United Transportation Union (John W. McGinness and George B. Lee), Brotherhood of Locomotive Engineers (Donald L. Lindsey), and Brotherhood of Maintenance of Way Employes (Winston C. Harbicht), respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on August 16, 1979 and November 29, 1979.[1]

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[1]This petition for certiorari embraces two cases that involve closely related questions. Rule 23(5).

OPINIONS BELOW

The opinion of the court of appeals in the "Prairie Trunk" case (App. A, pp. 1a-18a)[2] is reported at 604 F.2d 519. The opinion in the "Crab Orchard & Egyptian" case (App. B, pp. 21a-30a) is not reported.

The decision of the Interstate Commerce Commission ("I.C.C.") in the Prairie Trunk case (App. C, pp. 32a-74a) is reported at 348 I.C.C. 832; the I.C.C.'s decision in the Crab Orchard & Egyptian case (App. D, pp. 75a-88a) is not yet reported.

JURISDICTION

The judgment of the court of appeals in the Prairie Trunk case (App. A, p. 19a) was entered on August 16, 1979. The petitioners' timely petition for rehearing was denied on September 21, 1979 (App. A, p. 20a). On December 7, 1979, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to January 19, 1980.

The judgment of the court of appeals in the Crab Orchard & Egyptian case (App. B, p. 31a) was entered November 29, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the I.C.C. and the court of appeals properly found in this situation that a railroad carrier may acquire the line of another operating railroad carrier by means of section 1(18) of the Interstate Commerce Act, instead of by section 5(2) of that Act.

[2]"App." refers to the appendix to this petition.

2. Whether a railroad carrier may acquire trackage rights over, or joint ownership in or joint use of, a railroad line under section 1(18) of the Interstate Commerce Act, instead of by section 5(2) of that Act.

STATUTUES INVOLVED[3]

1. Section 1(18) of the Interstate Commerce Act, as amended by Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210, section 801, 90 Stat. 125-127),[4] provides in pertinent part as follows:

> (a) No carrier by railroad subject to this part shall –
>
> (i) undertake the extension of any of its lines of railroad or the construction of any additional line of railroad;
>
> (ii) acquire or operate any such extension or any such additional line; or
>
> (iii) engage in transportation over. or by means of, any such extended or additional line of railroad, unless such extension of additional line of railroad is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or will be enhanced by the construction and operation of such extended or additional line of railroad.

[3]On October 17, 1978, President Carter signed into law the Revision of Title 49, United States Code, "Transportation," Pub. L. 95-473, 92 Stat. 1337, which recodifies the Interstate Commerce Act. This petition refers to the relevant statutes by their former designations.

[4]Recodified by P.L. 95-473 (1978) 49 U.S.C. 10901. Former text is shown. See fn. 3.

2. Section 1a(8) of the Interstate Commerce Act, 49 U.S.C. 1a(8), as added by section 802 of Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210, 90 Stat. 100),[5] provides in pertinent part as follows:

> Petitions for abandonment or discontinuance which were filed and pending before the Commission as of the date of enactment of this section or prior to the promulgation by the Commission of regulations required under this section shall be governed by the provisions of section 1 of this Act which were in effect on such date of enactment. . ."

3. The former section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18),[6] as it pertained to abandonment of line or operation, provided as follows:

> . . . and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

4. Section5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2),[7] provides in pertinent part as follows:

> (a) It shall be lawful, with the approval and authorization of the Commission –

[5]Repealed by P.L. 95-473 (1978). See: H. Rept. 95-1395 at p. 246 (1978).

[6]Text is prior to amendment by section 801 of Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 125-27 (1976).

[7]Recodified by P.L. 95-473 (1978) as 49 U.S.C. 11343(a).

> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or
>
> (ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminal incidental thereto.

STATEMENT

The controversy involves the applicable statutory provision to govern the transfer of a line of railroad from one rail carrier to another. Petitioners urge that section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), governs the purchase, whereas the Interstate Commerce Commission ("I.C.C.") ruled that section 1(18), 49 U.S.C. 1(18) is the applicable statute for such purchase.

The I.C.C. in two separate proceedings, authorized two railroads to acquire portions of the lines of other

railroads, including in one instance trackage rights over a track jointly owned with a third railroad. The I.C.C.'s approvals were made in 1977 and 1978 under the provisions of section 1(18) of the Interstate Commerce Act, which as amended in 1976, is the statutory basis for approval of an extension of line by a railroad.

1. In the first proceeding, known as the "Prairie Trunk" case, an Administrative Law Judge ("ALJ") in 1973 denied an application by The Baltimore & Ohio Railroad Company ("B&O"), filed pursuant to section 1(18), for abandonment[8] of its 73.27-mile line (including 5.36 miles of joint line with Louisville & Nashville Railroad Company) running between Flora and Shawneetown, Ill. Sometime after B&O took an appeal of the ALJ's denial to a higher level in the agency, B&O entered into a sale agreement with Trans-Action Associates[9] whereby the B&O line and B&O's trackage rights over the joint line with L&N would be acquired by Trans-Action's wholly-owned subsidiary Prairie Trunk Railway. Thereafter, Prairie Trunk filed its application with the I.C.C. to acquire and operate B&O's line, including the trackage rights over the joint line with L&N, under section 1(18), and B&O requested dismissal of its abandonment application upon I.C.C. approval of Prairie Trunk's application. The I.C.C. in 1977 approved Prairie Trunk's extension application under section 1(18), and dismissed B&O's application for

[8]Section 1(18) prior to 1976 embraced abandonments as well as extensions of line. In early 1976, Congress split the abandonment provisions from section 1(18), and created a separate section 1a to deal with abandonments, P.L. 94-210, sections 801-802, 809(c). 90 Stat. 125-30, 146.

[9]Trans-Action Associates is a holding company which controls Louisiana Midland Railway Company. 604 F.2d at 522. (App. A, p. 3a).

abandonment. However, B&O's employees were accorded the traditional so-called *Burlington*[10] conditions which would have been applicable in an abandonment case. *Prairie Trunk Railway-Acquisition and Operation*, 348 I.C.C. 832 (App. C, p. 32a).

2. In the second proceeding, known as the "Crab Orchard" or "COE" proceeding, Illinois Central Gulf Railroad Company ("I.C.G.") in 1976 applied under the abandonment provisions of the former section 1(18) for authority to abandon its 14.5-mile line between Seely and Mande, Ill. Subsequently, American Rail Heritage, Ltd., doing business as Crab Orchard & Egyptian Railroad ("COE") reached agreement with I.C.G. to purchase the easternmost 8.53-mile segment between Ordill and Mande. COE In 1977 filed an application, as amended, under the extension provisions of section 1(18). Prior to the I.C.C.'s hearing, after I.C.G. embargoed the line, COE commenced operating the Ordill-Mande segment under temporary authority. The I.C.C. after a consolidated hearing approved COE's acquisition of the 8.53-mile Ordill-Mande segment and dismissed I.C.G.'s application for abandonment of that segment. At the same time the I.C.C. granted I.C.G.'s application for abandonment with respect to the remaining 5.97-mile westernmost segment. Finally, the I.C.C. imposed the so-called *Oregon Short Line* conditions for I.C.G. employees affected by the I.C.G. abandonment

[10]*Chicago, B. & Q.R. Co.-Abandonment*, 257 I.C.C. 700 (1944). The court of appeals erroneously states the *Burlington* conditions were developed also for acquisition cases. 604 F.2d at 523 fn. 7 (App. A, p. 5a). The usual employee conditions in acquisition cases under section 5(2) have been more developed in *New Orleans Passenger Terminal Case*, 282 I.C.C. 271 (1952).

or by the COE acquisition.[11] *Illinois Central Gulf Railroad Company — Abandoment Between Seely and Mande in Williamson County, Ill.* (App. D, p. 75a).

3. The basis for the I.C.C.'s finding that section 1(18) extensions are involved, rather than section 5(2) purchases, is the I.C.C.'s view that Congressional intent should prevail over the statutory language, and that section 5(2) governs the unification of existing enterprises, as in the case of consolidation or merger, whereas section 1(18) is intended to deal with abandonment, acquisition, and extension of an individual line of railroad by a single rail carrier or applicant. 348 I.C.C. at 850-51 (App. C, pp. 60a - 61a):

> "Further, while on the basis of the statutory language it is understandable that a degree of confusion exists as to whether section 1(18) or 5(2) applies to the proposed acquisition, a distinction between the types of proceedings to which the respective provisions are applicable has been recognized. On the basis of congressional intent we have found section 5(2) to be the appropriate provision for dealing with the unification of existing railroad enterprises, as in the case of consolidation or merger. (citations). Section 1(18), on the other hand, is intended to deal with the abandonment, acquisition, and extension of an individual line of railroad and is essentially directed at the transportation-oriented activities of a single rail carrier or applicant (citations)."

[11]Revised employee protection was mandated by 1976 legislation. This is discussed by the court of appeals in its Prairie Trunk decision. 604 F.2d at 528-29 (App. A, pp. 15a - 18a). The cut-off date for employee protection is not pressed in this petition for certiorari; rather, if an acquisition under section 5(2) is applicable, the appropriate revised conditions would appear to be the so-called *New York Dock* provisions. See: *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 354 I.C.C. 399 (1978) and 360 I.C.C. 60 (1979). These conditions govern transactions approved by the I.C.C. after February 5, 1976. *Missouri Pac. R. Co.-Merger-T&P and C&EI*, 360 I.C.C. 565 (1979).

The I.C.C. elaborated in the COE case that to require a carrier interested in a short segment of a line of rail to acquire such property pursuant to the provisions of section 5(2) might very well discourage it from such acquisition, contrary to the Congressional purpose in enacting section 5(2) of facilitating voluntary merger and consolidation. (App. D, pp. 78a-79a).

4. The court of appeals sustained the I.C.C. In lengthy opinions, the court made it clear that its reasoning as to the applicability of section 1(18) to the purchase did not depend upon the carrier or non-carrier status of Prairie Trunk or COE (App. B, pp. 25a):[12]

> "As we noted in *Prairie Trunk*, Section 1(18) was intended to deal with the acquisition, abandonment and extension of an individual line of railroad and was essentially directed at the transportation-oriented activities of a single rail carrier or applicant" (at p. 525; see also p.

[12]The court of appeals in the COE case states that COE "arguably" was not a carrier until the acquisition decision itself became effective on January 10, 1978, and that the court was advised on briefs that consummation awaits the court's decision. In actual fact, the I.C.C. expressly found COE to be a carrier within the meaning of section 5(2). (App. D, p. 79a). COE commenced common carrier operations on October 18, 1977. (App. B, p. 23a). Moreover, the court was advised at oral argument that I.C.G. and COE consummated the sale, such consummation taking place on June 20, 1979, some 3 months before oral argument. Similarly, the Prairie Trunk transaction was consummated October 1, 1979. In both instances, the I.C.C. refused to stay its orders, and the court of appeals likewise denied stays in both cases.

p. 526). *Prairie Trunk* specifically held that the ICC's dismissal of a pending abandonment (here the 8.53-mile segment) while authorizing a similtaneous acquisition by a different entity was consistent with this purpose (at pp. 524, 525). The reasoning leading to that conclusion did not turn on the operating status of the acquiring entity. Indeed, the *Prairie Trunk* case specifically cited the ICC's decision in the present case with approval (at p. 525 n. 13)."

REASONS FOR GRANTING THE WRIT

The I.C.C. and the court of appeals have ignored the plain meaning of the statutory language contained in section 5(2). The court of appeals admitted in the COE case that section 5(2) imposes "more stringent standards" for the approval of a proposed railroad transaction.[13] The history of misguided railroad manipulations suggests that the section 5(2) standards should not be relaxed in favor of resort to section 1(18). The I.C.C. and the court of appeals have decided an important question of federal law which should definitely be settled by this court at this time.

The railroad industry presently is in the process of a "restructuring." Numerous short-line railroads have arisen as a result of the subsidization provisions of the Railroad Revitalization and Regulatory Reform Act of

[13]The court of appeals in *Prairie Trunk* seems to suggest the main basis of opposition to Prairie Trunk's application stems from organized labor. 604 F.2d at 524. (App. A, p. 7a). This is not so. Other concerns and interests are involved. 348 I.C.C. at 844-45. (App. C, pp. 50a-51a). See also: 604 F.2d at 527-28. (App. A, pp. 13a-14a). The I.C.C. itself termed Prairie Trunk's future as fraught with "speculative uncertainties." 348 I.C.C. at 848. (App. C, p. 56a).

1976 (P.L. 94-210), as augmented by continuing amendments and appropriations. In addition, the I.C.C. recently issued its first general policy statement on railroad consolidations, and expressed a preference for restructuring transactions involving the purchase or inclusion of only part of a railroad. *Railroad Consolidation Procedures,* 359 I.C.C. 195 (1978).

I. THE STATUTORY LANGUAGE IS CLEAR AND UNAMBIGUOUS

The I.C.C. asserts "confusion" on the basis of the statutory language. 348 I.C.C. at 850-51. (App. C, pp. 60a - 61a). But section 5(2) of the Interstate Commerce Act has been on the books since 1920, and its basic provisions have been unchanged since 1940. Some six named kinds of transactions are within the scope of section 5(2), one of which is the purchase by one carrier of any part of the property of another carrier;

> "or for any carrier, or two or more carriers jointly, to *purchase,* lease or contract to operate the properties, *or any part thereof,* of another; (emphasis supplied).

This is specifically carried forward in the 1978 codification. 49 U.S.C. 11343(a)(2).

Trackage rights are another type of transaction within the scope of section 5(2):

> "for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

Likewise trackage rights are carried forward in the 1978 codification. 49 U.S.C. 11343(a)(6).

It is thus highly erroneous for the I.C.C. to confine the scope of section 5(2) to matters such as consolidation or merger. 348 I.C.C. 850 (App. C, p. 60a). There is no ambiguity in the express terms of section 5(2). The only conceivable issue could be whether Prairie Trunk and COE are "carriers." As to the latter, the I.C.C. expressly found COE to be a carrier. (App. D, p. 79a); and Prairie Trunk's application, embracing trackage rights and joint ownership and use with L&N, brings Prairie Trunk under section 5(2) in any event, unless excused by the *de minimis* reasoning of the court of appeals. 604 F.2d at 526. (App. A, p. 11a). However, the maxim of *de minimis non curat lex* is still law. The Congress in 1940 specifically intended to transfer the I.C.C.'s jurisdiction over trackage rights from section 1(18) to section 5(2). *Chicago, B. & Q.R. Co. Control,* 271 I.C.C. 63, 67 (1948); *International-G.N.R. Co. Trustee Trackage Rights,* 275 I.C.C. 27, 33 (1949). Moreover, the court of appeals based its affirmance of the I.C.C.'s decision without regard to the operating status of the applicants in each case. (App. B, p. 25a).

There is no ambiguity in the statute, and accordingly there is no need to resort to congressional intent to determine whether the purchase of railroad property, or the acquisition of trackage rights, is within the scope of section 5(2). Here, section 5(2) is plainly involved.

II. THE I.C.C.'s CLAIM OF CONGRESSIONAL INTENT IS UTTERLY WITHOUT FOUNDATION.

The I.C.C.'s finding that section 1(18), rather than section 5(2), governs acquisition of line and trackage rights, because of some vague "congressional intent" is utterly without support. The agency simply has not explained such congressional intent. No reference is made

to the history of the 1920 legislation enacting section 1(18), or the 1940 amendments to section 5(2). 348 I.C.C. 350-51. (App. C, pp. 60a-61a; App. D, pp. 78a-79a). Reference to the *Okmulgee Northern* decision of the I.C.C. indicates an intent to allow a section 1(18) acquisition where a section 1(18) abandonment is or otherwise would be authorized; and a section 5(2) acquisition where an abandonment is not granted or would be denied. *Okmulgee Northern Ry. Co. Abandonment,* 320 I.C.C. 637, 639-40:

> There is nothing in the I.C.C.'s recitation of congressional intent to indicate that in authorizing consolidations and mergers under section 5(2), the Congress intended to *preclude* section 5(2) from applying to purchases of carrier property and for trackage rights. Indeed, the express statutory language demonstrates otherwise, and the I.C.C. has in fact processed such purchases and trackage rights under section 5 where an abandonment is not involved.

III. THE RECENT STATUTORY INTERPRETATION BY THE I.C.C. IS ENTITLED TO NO WEIGHT.

While ordinarily the courts give deference to the construction of a statute by those charged with its execution, there are compelling indications here that the agency is wrong. *Miller* v. *Youakim,* ____U.S.____, 99 S.Ct. 957, 969 n. 25 (1979); *Udall* v. *Tallman,* 380 U.S. 1, 16-18 (1965).

The agency cites only three cases to support its view that a purchase can properly be made under section 1(18) rather than under section 5(2). 348 I.C.C. at 550-51 (App. C, pp. 59a-60a). *Cadillac & Lake City Ry. Co. Acquisition and Operation,* 320 I.C.C. 617 (1964);

Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (1964); *Iowa Term. R. Co. Acquisition and Operation,* 312 I.C.C. 546 (1961). These three citations are not contemporaneous. The lead case for the I.C.C.'s present construction of section 5(2) is actually the instant *Prairie Trunk* decision. In discussing a recent agreement between two major railroads, the Chicago, Milwaukee St. Paul & Pacific Railroad Company and Chicago & North Western Transportation Company, for the purchase by Milwaukee of a North Western line, the I.C.C. ruled that section 1(18) is applicable based upon *Prairie Trunk. F.D. 28412, Winnebago Farmers* v. *C&NW.*[14]

> "Historically, some confusion has existed concerning whether section 1(18) or section 5(2) is applicable to acquisitions of lines of railroads in situations similar to this proceeding. However, this was clarified in *Prairie Trunk Railway-Acquisition and Operation,* 348 I.C.C. 832, 850-1 (1977), which stated that, on the basis of Congressional intent, section 5(2) was the appropriate provision for dealing with the *unification* of existing railroad enterprises, citing *Okmulgee Northern Ry. Co. Abandonment,* 320 I.C.C. 637, 639-40 (1964), *Tennessee Central Ry. Co. Abandonment,* 334 I.C.C. 235, 245 (1969) and *So. Ry. Co.-Control-Central of Georgia Ry. Co.,* 331 I.C.C. 151, 156-7 (1967). However, section 1(18), in contrast, is intended to deal with the abandonment and extension of an *individual line* of railroad and is essentially directed toward transportation-oriented activities of a single rail carrier

[14]Cited by the court of appeals, but not yet officially reported. 604 F.2d at 525 fn. 13 (App. A, p. 8a). See also *Terminal Ry. Ala. State Docks Operation, Mobile, Ala.,* 354 I.C.C. 747 (1978).

> applicant. *Iowa Term R. Co. Acquisition and Operation,* 312 I.C.C. 546 (1961)."

There is simply no "confusion."[15] The "confusion" is of the I.C.C.'s own doing. The use of section 1(18) to purchase railroad lines has been made in situations where the line otherwise would be abandoned under the former section 1(18). The I.C.C. stated in the principal case upon which it relied in *Prairie Trunk,* i.e., *Okmulgee Northern Ry. Co. Abandonment,* 320 I.C.C. 637 (1964), that the filing of two applications, one to abandon and the other to acquire, is the agency practice. 320 I.C.C. at 640:

> "The filing of the two applications under section 1(18) is consistent with prior Commission decisions, and both anticipate and satisfy certain conditions which the Commission has imposed in prior abandonment cases; namely, that the abandoning carrier offer its line for quick sale to any person willing to continue operations thereon for the benefit of the public and the few shippers requiring continued service."

Iowa Term R. Co. Acquisition and Operation, 312 I.C.C. 546 (1961), involved a situation where the I.C.C.

[15]The court of appeals cited several proceedings involving non-carrier acquisition of existing lines, but these cases do not apply to trackage rights situations, or where a carrier clearly is involved. 604 F.2d at 524-25. (App. A, pp. 7a-9a). Moreover, the 1928 Supreme Court citations to I.C.C. proceedings involve largely construction of new lines, rather than the transfer of existing lines as in the Prairie Trunk and COE situations. 604 F.2d at 524 (App. A, 7a). It is also important not to be misled by technical transfers of property to a new corporation under a corporate bankruptcy equity reorganization, prior to enactment of section 77 of the Bankruptcy Act in 1933. 11 U.S.C. 205.

was careful to state that none of the persons affiliated with the applicant are involved with any carrier. 312 I.C.C. at 548:

> "The applicant in this proceeding, although organized to acquire a line of railroad, has never engaged in any transportation. Neither it nor the persons who control it are affiliated with any carrier subject to the act."

Clearly, the *Iowa Terminal* situation does not apply, particularly where COE is a carrier, and where the officers of *Prairie Trunk* are involved in other railroads, with Prairie Trunk an affiliate of Louisiana Midland Railway.

Cadillac & Lake City Ry. Co. Acquisition and Operation, 320 I.C.C. 617 (1964), stated that the abandonment application was being dismissed as a matter of procedure, the indication being that the abandonment would be granted absent the acquisition application. 320 I.C.C. at 618.

The function of a section 1(18) acquisition has been fitted to deal with the acquisition of a dying line by one willing to attempt to make a going concern of it, while section 5(2) is for the transfer of an already viable operation to another operator. See also: *East Carolina Ry. Abandonment,* 324 I.C.C. 506, 517 (1964); *Tennessee Central Ry. Co. Abandonment,* 334 I.C.C. 225, 235 (1969).

Here, B&O's operation of line was viable, and its application for abandonment was denied by the ALJ. In the COE situation, the I.C.C. found that based upon I.C.G.'s cost evidence it would be improper to grant the full line abandonment. (App. D, p. 83a). Accordingly,

the section 1(18) approach taken in the Prairie Trunk and COE situations is not consistent with prior agency practice.

When Louisville and Nashville Railroad Company purchased the so-called Evansville line of Chicago & Eastern Illinois Railroad Company, its application was filed under section 5(2), and not section 1(18). *Louisville & N.R. Co.-Pur-Chicago & E.I.R. Co.,* 334 I.C.C. 273 (1968). Similarly, section 5(2) governed the purchase by Chicago & North Western Railway Company of the property of Minneapolis & St. L. Railway Company. *Chicago & N.W. Ry. Co. Purchase, Minneapolis & St. L. Ry. Co.,* 312 I.C.C. 285 (1960).

The I.C.C. cites no precedent for its action in authorizing Prairie Trunk's acquisition of B&O's interest in the 5.36-mile joint track with L&N. The court of appeals struggled with the trackage rights, and the necessity for some section 5(2) approval, by terming the joint line *de minimis.* The court of appeals added that section 1(18) governs single applicants whereas section 5(2) involves multi-carrier transactions, and that only B&O has protectible employees. Simply stated, there is no precedent for the I.C.C.'s finding the trackage rights to be acquired by Prairie Trunk are outside the scope of section 5(2). The agency decisions in *North Western Employees-Pur.-Chicago & N.W. Ry. Co.,* 342 I.C.C. 58, 64, 125-26 (1972) and *Newrail Co., Inc.-Pur-The Western Pac. R. Co.,* 354 I.C.C. 885, 889 (1979), are indicative of section 5(2)'s applicability.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit in these cases.

Respectfully submitted,

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January 1980

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1333

PEOPLE OF THE STATE OF ILLINOIS, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition for Review of an Order of the Interstate Commerce Commission

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ARGUED APRIL 23, 1979—DECIDED AUGUST 16, 1979

Before CUMMINGS, *Circuit Judge*, MOORE, *Senior Circuit Judge*,* and TONE, *Circuit Judge*.

CUMMINGS, *Circuit Judge*. This petition for review was filed by the State of Illinois, the Illinois Commerce Commission and the United Transportation Union and asks us to set aside and remand the report and order of Division 3 of the Interstate Commerce Commission in *Prairie Trunk Railway—Acquisition and Operation*, 348 I.C.C. 832 (1977). The Brotherhood of Locomotive Engineers intervened on behalf of petitioners and the Baltimore & Ohio Railroad Company (sometimes refer-

* The Honorable Leonard Page Moore, Senior Circuit Judge of the Second Circuit of the United States Court of Appeals, is sitting by designation.

red to as B & O), the Prairie Trunk Railway, Trans-Action Associates, Incorporated, the Shawneetown Regional Port District and the Baltimore & Ohio Concerned Citizens of Southern Illinois[1] intervened in support of respondents Interstate Commerce Commission and the United States. In all, nine briefs have been filed in this Court in support of the positions taken by the parties and intervenors.

In the Interstate Commerce Commission's decision presently under review, the Commission authorized the Prairie Trunk Railway to acquire and operate the 73.27-mile line[2] of the Baltimore & Ohio Railroad Company between Flora and Shawneetown, Illinois. 348 I.C.C. 832. In the same report, as shown *infra*, the Commission authorized Prairie Trunk to issue not more than 750,000 shares of no-par value common stock to holding company Trans-Action, authorized Trans-Action to control Prairie Trunk and dismissed the application of the Baltimore & Ohio to abandon the line of railway being acquired by Prairie Trunk.

This proceeding commenced with the Baltimore & Ohio's December 1971 application for a certificate of public convenience and necessity under Section 1(18) of the Interstate Commerce Act[3] permitting the abandon-

[1] This organization represents approximately 100 shippers served by the Flora-Shawneetown, Illinois, branch railroad line involved herein.

[2] The 73.27 miles include 5.36 miles of track between Junction and New Shawneetown, Illinois, jointly owned and operated by the Baltimore & Ohio and Louisville & Nashville Railroads. By the acquisition agreement Prairie Trunk purchased B & O's right to use this trackage.

[3] During the relevant period Section 1(18) of the Interstate Commerce Act provided in pertinent part:

> "[N]o carrier by railroad subject to this part * * * shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require

(Footnote continued on following page)

ment of operations over its branch line between Flora and Shawneetown. In January 1973 an administrative law judge recommended that the Baltimore & Ohio abandonment application be denied.[4]

In October 1973, Prairie Trunk, a corporation organized to acquire and operate the 73.27-mile Flora-Shawneetown line of railroad, sought Commission authority to do so pursuant to Section 1(18) of the Act. Baltimore & Ohio expressed its support of the Prairie Trunk application and asked the Commission to dismiss its own abandonment application upon approval of the Prairie Trunk acquisition. Prairie Trunk also sought authority under Section 20a of the Act (49 U.S.C. § 20a) to issue $100,000 of no-par common stock and a secured 15-year promissory note (not exceeding $650,000) to Trans-Action Associates, a non-carrier holding company controlling Louisiana Midland Railway Company, a common carrier by railroad. Upon the issuance of the securities, Prairie Trunk would become a wholly-owned subsidiary of Trans-Action.[5]

[3] *continued*

> or will require the * * * operation * * * of such additional * * * line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment * * *." (49 U.S.C. § 1(18).)

[4] The administrative law judge found:

> "Notwithstanding applicant's lack of interest in the branch, the record indicates a very substantial traffic potential. The shippers in the area need applicant's services, and an aggressive and positive approach to meeting these needs would appear to assure the traffic gains necessary for profitable operation of the branch". (J.App. 13.)

He therefore concluded that the public convenience and necessity would not permit granting the abandonment application.

[5] The Commission's report describes the operations of Trans-Action as follows:

(Footnote continued on following page)

A different administrative law judge approved the Secton 1(18) acquisition proposed by Prairie Trunk subject to (1) the Commission's subsequent approval of an appropriate application under Section 5(2) of the Act[6]

[5] *continued*

"Trans-Action is a transportation consulting firm specializing in light-density rail line problems. Since its organization in May 1971, it has been engaged in the development of short-line feasibility studies (including engineering reports), the financing of new railroad ventures, and, in the course of assisting interested parties involved in transportation regulatory matters, in the preparation of pleadings, analyses, and testimony. It has functioned as a consultant and provided complete organization and management services for a variety of short-line railroads. In view of this background, particularly that relating to the organization and operation of short-line railroads, we are satisfied that Trans-Action possesses the experience and knowledge required to provide Prairie Trunk with the kind of responsible leadership and management necessary to undertake and successfully pursue the short-line railroad operation proposed herein." (J.App. 49.)

[6] Section 5(2) of the Act provides in pertinent part:

"(a) It shall be lawful, with the approval and authorization of the Commission * * *

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto." (49 U.S.C. § 5(2).)

by Trans-Action to control Prairie Trunk, (2) the *Burlington* conditions for the protecton of railway employees,[7] the expense of which was to be borne by the Baltimore & Ohio, and (3) certain other conditions pertaining to the acquisition.

In September 1974, Trans-Action filed an application under Section 5(2) of the Act seeking the Commission's approval for control of Prairie Trunk.

These various matters were consolidated for disposition by the Commission in a single report, and on February 17, 1977, the Commission disposed of them. It found that the present and future public convenience and necessity required the acquisition and operation by Prairie Trunk of the Flora-Shawneetown line of railroad subject to (1) the *Burlington* conditions for the protection of employees, which cost was to be borne by the Baltimore & Ohio; (2) the placing by Trans-Action of $750,000 in cash or equivalent assets at the disposal of Prairie Trunk; and (3) for a period of five years after the acquisition, no abandonment application could be filed by Prairie Trunk prior to a bona fide offer of resale "to any party to this proceeding at a purchase price no less favorable than the $500,000 to be paid to the Baltimore & Ohio Railroad Company for the acquisition, adjusted to Consumer Price Index changes."[8] 348 I.C.C. at 854.

The Commission next found that Prairie Trunk could issue 750,000 shares of no-par value common stock with a stated value of $1 per share to Trans-Action to finance the acquisition.[9] The Commission also found that acqui-

[7] The *Burlington* conditions were developed in *Chicago, B. & Q. R. Co.—Abandonment*, 257 I.C.C. 700 (1944), to protect employees adversely affected by an abandonment or acquisition.

[8] This provision was included to overcome the doubts expressed by protestants about Prairie Trunk's good faith intentions to operate the line rather than to take a quick profit from the resale of assets which by then had appreciated well beyond the $500,000 purchase price.

[9] The Commission modified the ALJ's order to require the full $750,000 contribution by Trans-Action to be equity, rather

(Footnote continued on following page)

sition by Trans-Action of control by Prairie Trunk was within the scope of Section 5(2) of the Act and consistent with the public interest. The Section 5(2) application had become necessary because on March 27, 1974, the Commission authorized Louisiana Midland Railway Company, a subsidiary of Trans-Action, to acquire and operate a low density branch line of the Illinois Central Railroad Company in the state of Louisiana. Thus with Prairie Trunk's acquisition of the B & O line, Trans-Action would acquire control of two carriers, bringing Section 5(2) into effect. This relationship was fully disclosed at the proceeding regarding Prairie Trunk's acquisition application, which had been filed under Section 1(18) because at the time (October 1973) Trans-Action was neither a carrier nor affiliated with a carrier. The Commission concluded that Trans-Action's control of both Louisiana Midland and Prairie Trunk was justified, noting:

> "[The Louisiana Midland line] is separated geographically from the southeastern Illinois line of railroad and area of service identified with the proposed Prairie Trunk operation by well in excess of 500 miles. * * * [T]he two railroad operations are so clearly separate and unrelated as to merit our concluding that common ownership and control of Louisiana Midland and Prairie Trunk by Trans-Action will have no adverse competitive effect upon the utilizers of their respective services." 348 I.C.C. at 846.

Finally, the Commission found that the Baltimore & Ohio's application for abandonment should be dismissed and that "this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." 348 I.C.C. at 855. Consequently, on the same day, the Commission issued a certificate of public convenience and necessity and an

[9] *continued*
than $100,000 equity and $650,000 debt. This was intended to strengthen Prairie Trunk's capital structure and thereby assure its viability.

order carrying out the Commission's report (J.App. 61-62). We affirm.

I. *Section 1(18) of the Interstate Commerce Act Applies to This Acquisition.*

In order to obtain the more liberal employee labor protective conditions established in *Oregon Short Line R. Co.—Abandonment, Goshen*, 354 I.C.C. 76 (1977); 354 I.C.C. 584 (1978) and ..... I.C.C. ..... (1979),[10] petitioners mainly argue that Prairie Trunk's acquisition should have been considered by the Commission under Section 5(2) (note 6, *supra*) rather than under Section 1(18) of the Act (note 3, *supra*). We disagree.

As far back as 1928, the Supreme Court recognized that Section 1(18) of the Act is applicable to obtain initial interstate operating authority by a non-carrier like Prairie Trunk. *Texas & C.R.R. v. Northside Ry.*, 276 U.S. 475, 479, 480, and Commission cases cited at 480-481, n.1. Accordingly, the Commission has often held that Section 1(18) governs applications by a non-carrier for authority to acquire and operate an existing line of railroad. *Acquisition by Frankfurt & Cincinnati R.R.*, 124 I.C.C. 500 (1927); *Iowa Term. R. Co.—Acquisition and Operation*, 312 I.C.C. 546 (1961); *Cadillac & Lake City Ry. Co.—Acquisition and Operation*, 320 I.C.C. 617 (1964); *Northwestern Employees—Pur.—Chicago & N.W. Ry. Co.*, 342 I.C.C. 58, 65-66 (1972); *Okmulgee Northern Ry.—Abandonment*, 320 I.C.C. 637 (1964). It is immaterial whether a corresponding abandonment application for the line of track to be acquired has been filed by the existing operating carrier or has been denied. *Acquisition by Frankfurt & Cincinnati R.R., supra; Iowa Term. R. Co.—Acquisition and Operation, supra; Northwestern Employees—Pur.—Chicago & N.W. Ry. Co., supra*. On the other hand, Section 5(2) is applicable to various purchase transactions between two or more carriers.

[10] The 1979 opinion in the *Oregon Short Line* case is not yet officially reported but appears in Appendix 1 to the Supplemental Joint Brief of the Interstate Commerce Commission and United States filed on March 26, 1979.

Petitioners concede that Section 1(18) is concerned with the acquisition of a line being abandoned by another carrier and acknowledge that the Section 1(18) proceeding would have been proper for Prairie Trunk's acquisition of this branch line if the Commission had approved abandonment of the line by the vendor Baltimore & Ohio (Nov. 1977 Br. 16, 18-19; United Transportation Union and Brotherhood of Locomotive Engineers Group Reply Br. 2). However, the language of Section 1(18) (note 3, *supra*) does not so require, and, as seen, the precedents are to the contrary.

In the present proceeding, the Commission explained the basis for considering this application under Section 1(18) rather than under Section 5(2). It stated that the latter is the appropriate provision for dealing with the unification of existing railroad enterprises, such as a consolidation or merger.[11] 348 I.C.C. at 850-851. On the other hand, the Commission explained that Section 1(18) was intended to deal with the acquisition, abandonment and extension of an individual line of railroad and was essentially directed at the transportation-oriented activities of a single rail carrier or applicant.[12] 348 I.C.C. at 851. Because the present proceeding is concerned with the simple acquisition of a line by a prospective new rail carrier, the Commission followed Section 1(18). *Ibid.* We are satisfied that this rationale[13] was permissible and therefore rule that pre-1976 Section 1(18) governs this

[11] Citing *Okmulgee Northern Ry. Co.—Abandonment*, 320 I.C.C. 637, 639-640 (1964); *Tennessee Central Ry. Co.—Abandonment*, 334 I.C.C. 235, 245 (1969); and *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 156-157 (1967).

[12] Citing *Okmulgee Northern Ry. Co—Abandonment*, 320 I.C.C. 637, 639-640 (1964); and *Iowa Term. R. Co.—Acquisition & Operation*, 312 I.C.C. 546, 548-549 (1961).

[13] This rationale was recently adopted and expanded in *Winnebago Farmer's Elevator Company*, ... I.C.C. ..... (1978); *Illinois Central Gulf Railroad Company—Abandonment*, ... I.C.C. ..... (1978); and *Terminal Ry. Ala. State Docks Operation, Mobile, Ala.*, 354 I.C.C. 747 (1978). All three decisions are attached to petitioners' October 1978 reply brief.

1971 abandonment-1973 acquisition proceeding.[14] Indeed where applicants have mistakenly filed proceedings under Section 5(2), the Commission has treated their applications as if filed under Section 1(18). *Okmulgee Northern Ry. Co.—Abandonment*, 320 I.C.C. 637 (1947); *Iowa Term. R. Co.—Acquisition and Operation*, 312 I.C.C. 546 (1961). Moreover, in other cases the Commission has dismissed a pending abandonment while approving a simultaneous acquisition by a new applicant. *Louisiana Midland Railway Company—Acquisition*, (1974) (Finance Docket No. 27450, unreported, reproduced as App. A to Prairie Trunk Br.); *Acquisition of Chicago, Terre Haute & Southeastern Ry. Co.*, 70 I.C.C. 20 (1921); *Cadillac & Lake City Ry. Co.—Acquisition and Operation*, 320 I.C.C. 617 (1964). Even though the initial administrative law judge had recommended against abandonment by the Baltimore & Ohio, it was nevertheless appropriate for the Commission itself to authorize Prairie Trunk to operate the Flora-Shawneetown line.[15] *Acquisition by Frankfurt & Cincinnati R.R.*, 124 I.C.C. 500 (1927). In *Okmulgee Northern Ry. Co.—Abandonment, supra*, the only case relied upon to the contrary, abandonment was authorized before the acquisition was. However, the Commission never stated that abandonment was an essential element for the acquisition procedure. Therefore it cannot be said, as petitioners do in their opening brief, that "the usual procedure in a section 1(18) acquisition proceeding is for the I.C.C. to approve an abandonment by the vendor carrier" (Br. 18).

Finally, protestants rely on *North Western Employees Transportation Corporation—Pur.—Chicago & N.W. Ry. Co.*, 342 I.C.C. 58 (1972) and *Newrail Co., Inc.—Pur.—Western Pac. Ry. Co.*, 354 I.C.C. 885 (1979) for the proposition that Prairie Trunk's acquisition from B & O of 5.36 miles of trackage rights jointly owned with

[14] The applicability of former Section 1(18) instead of the amended version is discussed in Part IV, *infra*.

[15] The differences between the service provided by B & O and that proposed by Prairie Trunk are described in the next section of this opinion.

Louisville & Nashville Railroad requires this proceeding to be brought under Section 5(2) rather than Section 1(18).[16] Neither of those cases compels that conclusion. Both of them involved the purchase by a newly formed corporation (to be owned by the existing carrier's employees) of all of the railroad-related assets of the vendor, which included many miles of joint ownership of lines, operating authorities, and leases of and contracts to operate the properties, including terminals, of other carriers. The *North Western* proceeding was filed under Section 5(2). The hearing examiner rejected the protestants' contention that he lacked jurisdiction because the proceeding should have been brought under Section 1(18). He held that the acquisition of the joint trackage rights by the new corporation (Netco) conferred jurisdiction under Section 5(2). The Commission agreed with the hearing examiner that the involvement of the joint operating and trackage rights gave it jurisdiction under Section 5(2), but noted:

> "However, his findings of jurisdiction do not completely meet the requirements of this case since section 5(2) though encompassing the purchase of the properties of two or more carriers, does not deal with the licensing of a noncarrier applicant such as Netco, that has never performed common carrier service.
>
> "[T]his commission has consistently entertained applications by noncarrier corporations, under section 1(18) of the act, proposing to engage in railroad operations. * * * In these circumstances, sections 1(18) and 5(2) are complementary and not mutually exclusive." (342 I.C.C. at 65, citations omitted.)

In the recent *Newrail* case, which involved a proposed transaction very similar to the one in *North Western*, the proceeding was filed under both Sections 1(18) and 5(2), and authority was granted under both Sections. In the case before us, the proceeding was originally filed under Section 1(18), but a supplementary Section 5(2) application was later filed. The Commission chose to treat the transfer of control from B & O to Prairie Trunk,

[16] See Section 5(2)(a)(ii), quoted in note 6, *supra*.

including the transfer of the trackage rights, under Section 1(18). As explained by the ALJ:

> "Authorization of assignment of Chessie System's [B & O's] trackage rights as a part of approval of the proposed transaction is consistent with the language of section 1(18), so long as there is no change in the substantive terms of the arrangement" (J. App. 19).

The ALJ and the Commission were justified in proceeding this way.

The *North Western* and *Newrail* cases are distinguishable on a number of grounds. First, those cases involved the acquisition of huge interstate rail systems with complex facilities-sharing arrangements with a number of different carriers.[17] Thus the acquisition of trackage and related rights was substantial and a very important part of the transaction. In the present case, the acquisition was of one intrastate short line, which happened to include trackage rights jointly owned with one other carrier over only 5.36 miles of track. As the Commission recognized in the excerpt quoted *supra*, Section 1(18) and 5(2) transactions will often be closely related. Here the Commission was justified in concluding that the *de minimis* involvement of joint trackage rights did not compel proceeding under Section 5(2) in what was otherwise a Section 1(18) case.

Second, the decision to proceed under Section 1(18) was fully consistent with the rationale that Section 1(18) applies to single applicants, whereas the focus in Section 5(2) proceedings is on the potential competitive effect of multi-carrier transactions.[18] The potentially anti-competitive impact of the acquisition of ownership rights in key facilities to which other carriers need access is obvious. In both the *North Western* and the *Newrail* cases the Commission, acting under Section 5(2), imposed appropriate conditions to preserve routes, gate-

[17] The acquisition in the *North Western* case was of 11.373 miles of railroad lines which operated in 11 different states.

[18] In *North Western* and *Newrail* the acquisition apparently involved a parent corporation and its subsidiaries, so that technically property of more than one carrier was being acquired.

ways and other traffic and operating relationships involving other carriers. Of course, there is no occasion for any such concern in the present case, and therefore no need to assume Section 5(2) jurisdiction.

Third, the employee protective provisions usually applied in Section 1(18) proceedings are appropriate here. The Commission explained that its practice had been to apply the *Burlington* conditions when protection was deemed appropriate in Section 1(18) cases, whereas different and somewhat more expansive protection was normally imposed in Section 5(2) proceedings. The reason for the difference, according to the Commission, is that the *Burlington* conditions were applied when the employees of only a single rail carrier would be affected. 348 I.C.C. at 851. Here only the vendor has protectible employees, and in this respect the proceeding is analogous to an abandonment, which would be dealt with under Section 1(18). In contrast, the *North Western* and *Newrail* cases really amounted to a reorganization of existing lines, with the same employees continuing operations under a new corporate form. From the employees' point of view the situation in those cases was similar to a combination of existing carriers and the conditions usually imposed in Section 5(2) proceedings were therefore appropriate.

Thus the fortuitous involvement of a few miles of shared track does not alter our conclusions that the Commission correctly proceeded under Section 1(18) and that the most appropriate employee protective provisions were applied.

II. *The Commission Properly Concluded that Prairie Trunk's Position Is Required by Public Convenience and Necessity.*

It is axiomatic that the courts are not to disturb a public convenience and necessity decision of the Interstate Commerce Commission if it is based upon adequate findings supported by substantial evidence. *E.g., United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536. This Record shows that the B & O's service over the

Flora-Shawneetown branch was unsatisfactory and had caused numerous complaints from shippers. That carrier was not endeavoring to increase traffic on this branch and did not provide an adequate car supply. Not only had it decreased its service to two times a week on this line, but there was a downward trend of traffic from 1969 through 1979 (except 1970), and the railroad had failed to provide sufficient maintenance expenditures on this branch since 1958. Contrariwise the Commission noted that Prairie Trunk proposed a five-day week service on the line and planned to solicit local traffic aggressively. The Commission was satisfied with Prairie Trunk's management, capital and rolling stock supply. The acquisition was supported by a group of 100 shippers and consignees and the Shawneetown Regional Port District.[19] These findings justified the Commission's conclusion that the acquisition is required by the public convenience and necessity (348 I.C.C. at 854).[20]

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[19] The only other shipper group to appear was the I.A.A., a farmers' association, and its position vacillated. It first opposed the B & O abandonment application, then supported Prairie Trunk's acquisition application, and later opposed that acquisition. The final opposition apparently was based on information of disputed veracity.

[20] Petitioners point out that Section 1(18) was amended prior to the Commission's report, and that it now requires a finding that "the present or future public convenience and necessity require *or will be enhanced by*" the proposed change (emphasis added). They argue that since the Commission did not specifically make an "enhancement" finding, the case should be remanded to the Commission for a finding that B & O's existing service is inadequate. This is clearly unnecessary because by finding the acquisition required by the public convenience and necessity the Commission said all that was necessary. Additionally, we note that even if the Commission had relied on the "enhancement" rationale, this need not be based on a finding of inadequate present service. Clearly the public interest is enhanced through improved service even if the old service was "adequate." And the Commission plainly found that Prairie Trunk's proposed service would be an improvement over B & O's.

III. *An Environmental Threshhold Assessment Survey Is Unnecessary.*

Petitioners urge us to remand this proceeding to the Commission so that it can prepare an environmental threshhold assessment survey under the National Environmental Policy Act of 1969. Under that statute, the appropriate agency, here the Interstate Commerce Commission, is authorized to determine whether the proposed action is "a major Federal action significantly affecting the quality of the human environment". If so, a detailed environmental statement must be prepared. See 42 U.S.C. § 4332(2)(C). Here the administrative law judge found that since the acquisition proposal contemplated continuing an existing operation with merely a change of management, granting approval of the application would not "have any effect on air pollution, soil pollution, noise pollution, or water pollution; nor are any commitments of natural resources foreseeable" (J. App. 23). The Commission itself reiterated this because the proposed acquisition "contemplate[d] a continuation of rail service over the same trackage" (348 I.C.C. at 853).[21] Since petitioners have not shown that a significant environmental impact could be expected to result from Prairie Trunk's giving the proposed service five times a week instead of twice a week, the Commission's negative environmental determination will not be set aside.[22]

[21] Petitioners also assert that because in their view Prairie Trunk is not likely to remain viable for long, the Commission should have required an environmental impact statement for the abandonment it predicts will soon ensue. Clearly the Commission was not required to speculate in this way. Equally clearly, it does not share petitioners' pessimism about Prairie Trunk's prospects. The Commission carefully reviewed Trans-Action's background, ascertained that its support of Prairie Trunk would be adequate, and indicated that it would not look favorably on an abandonment application by Prairie Trunk (348 I.C.C. at 849).

[22] Indeed the propriety of the negative environmental finding of the Commission is not properly before us since it was not raised in the application for review by the full Commission. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558.

IV. *The Commission Was not Required to Consolidate This Proceeding with Two Other B & O Abandonment Proceedings.*

Petitioners also argue that the Commission was compelled to consolidate this proceeding (concerning B & O's abandonment of the 73.27 mile southern segment of the 228-mile line of track between Beardstown and Shawneetown and concerning Prairie Trunk's acquisition) with abandonment applications filed by the B & O relating to the northern and middle segments of this line of track. This Court already rejected that argument (order of March 23, 1977, in case No. 76-1561, cited in 558 F.2d 1032, certiorari denied, 434 U.S. 828). We agree with the prior panel that the choice not to consolidate the related proceedings was well within the Commission's discretion. As the ALJ noted in denying consolidation:

> "Each of the proceedings is clearly identifiable and separate, the shippers and their interests are different, and the proposed disposition of the applications are different, based upon different facts and circumstances applicable to the respective applications" (J. App. 3).

V. *The Burlington Labor Protective Conditions Were Properly Imposed.*

Petitioners' final contention is that the Commission was required to impose the more liberal labor protective conditions set forth in its three *Oregon Short Line* decisions,[23] instead of the *Burlington* conditions established in *Chicago B. & Q. R. Co.—Abandonment*, 257 I.C.C. 700 (1944). However as we held in Part I of this opinion, former Section 1(18) of the Interstate Commerce Act governs these proceedings, and under that provision, the imposition of employee labor protective conditions is within the discretion of the Commission.

[23] Two of these decisions are reported in 354 I.C.C. 76 and 584. The third is reproduced in Appendix 1 to the Government's March 1979 Supplemental Brief.

Interstate Commerce Commission v. Railway Labor Assn., 315 U.S. 373. Under former Section 1(18) the Commission routinely imposed the *Burlington* conditions where labor protective conditions were warranted. See *Cadillac Lake City Ry.—Acquisition and Operation*, 320 I.C.C. 617 (1964); *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 584, 594 (1978). The only employees affected by the acquisition are four B & O employees who work on this section of track two days a week. Under the *Burlington* conditions, these employees will receive four years' pay even though they do not work (B & O Br. 15; Prairie Trunk Br. 16).

Former Section 1(18) of the Interstate Commerce Act was amended on February 5, 1976, when the Railroad Revitalization and Reform Act was enacted. Pursuant to the amendment the Commission was required henceforth to impose in Section 1(18) cases employee labor protective conditions no less favorable than those imposed under former Section 5(2)(f) of the Act. 49 U.S.C. § 1a(4) (90 Stat. 128), now 49 U.S.C. § 10903(e)(2). However, a saving clause in the new statute exempted abandonment or discontinuance proceedings filed or pending before the Commission on February 5, 1976. 49 U.S.C. § 1a(8).[24] Here B & O's abandonment application, prompting the Commission to impose the *Burlington* labor conditions on the B & O, was filed on December 22, 1971, so that there was no necessity for the Commission to impose the *Oregon Short Line* conditions in lieu of the *Burlington* conditions.

In the second *Oregon Short Line* decision the Commission decided to give retroactive application to that case's broad employee labor protective conditions in

[24] Section 1a (8) of the Act as amended in 1976 provided:

"Petitions for abandonment or discontinuance which were filed and pending before the Commission as of the date of enactment of this Section [February 5, 1976] or prior to the promulgation by the Commission of regulations required under this Section [November 1, 1976] shall be governed by the provisions of Section 1 of this Act which were in effect on such date of enactment * * *." (90 Stat. 130.)

Section 1(18) applications that had not proceeded to administrative finality on August 18, 1977, the date the Commission's initial *Oregon Short Line* was served. In the present case, the administratively final decision of the Commission was rendered on July 27, 1977, when it denied petitions for reconsideration of its March 15, 1977, decision dismissing B&O's abandonment application and approving the acquisition of the line by Prairie Trunk. 49 U.S.C. § 10327(i) (formerly Section 17(9)(h)). It was appropriate for the Commission to establish a date (August 18, 1977) after which the broader employee labor protective conditions of *Oregon Short Line* would be applied because, as the Commission stated in the second *Oregon Short Line* decision:

> "In this manner we will give prospective application to our decision. At the same time, we will not be required to reopen the abandonment cases which were finally decided before service of the prior report. We will also be able to eliminate inconsistent treatment of parties by applying the protection to all cases pending on August 18, 1977." 354 I.C.C. at 595.

This was a reasonable limitation for the Commission to place on its voluntary retroactive extension of *Oregon Short Line*.[25]

Petitioners have made no argument that the *Burlington* conditions are inadequate to protect the interests of the affected employees. Therefore, we will not disturb the cut-off date established by the Commission for the imposition of the *Oregon Short Line* conditions.

[25] Petitioners also argue that since the proceedings in the present case were stayed by the Commission after August 18, 1977, pending administrative review, there had been no administratively final decision on August 18, 1977. However, by its decision of January 3, 1979, (Respondents' Supp. Br. App. 2) the Commission held that the initial administratively final decision, not extended by stays, is the determinative date for determining whether *Oregon Short Line* applies. This was a reasonable criterion to adopt, especially in view of the fact that the Commission regularly grants stays for administrative or judicial review.

No. 77-1333

The Interstate Commerce Commission's decision is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Cummings

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 16, 1979

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. LEONARD PAGE MOORE, Senior Circuit Judge*
Hon. PHILIP W. TONE, Circuit Judge

No. 77-1333

PEOPLE OF THE STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, JOHN W. McGINNESS, AND GEORGE B. LEE, Petitioners.	)	
DONALD L. LINDSEY, *Intervenor*,	)	On Petition for Review
vs.	)	of an Order of the
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Respondent*,	)	Interstate Commerce Commission.
PRAIRIE TRUNK RAILWAY and TRANSACTION ASSOCIATES, INC., BALTIMORE AND OHIO RAILROAD COMPANY, SHAWNEETOWN REGIONAL PORT DISTRICT and B & O CONCERNED CITIZENS, *Intervenors*.	)	

This cause came on to be heard on the transcript of the record from the Interstate Commerce Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Interstate Commerce Commission in this cause be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

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*The Honorable Leonard Page Moore, Senior Circuit Judge of the Second Circuit of the United States Court of Appeals, is sitting by designation.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 21, 1979

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. LEONARD PAGE MOORE, Senior Circuit Judge*
Hon. PHILIP W. TONE, Circuit Judge

PEOPLE OF THE STATE OF ILLINOIS, et al., *Petitioners,,*	)	
No. 77-1333	)	On Petition for Review
vs.	)	of an Order of the
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Respondents.*	)	Interstate Commerce Commission.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by petitioners, People of the State of Illinois, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

*The Honorable Leonard Page Moore, Senior Circuit Judge of the Second Circuit of the United States Court of Appeals, is sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued September 26, 1979
November 29, 1979

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

PEOPLE OF THE STATE OF ILLINOIS, et al.	)	
Petitioners	)	On Petition for Review
	)	of an Order of the
No. 79-1005 vs.	)	Interstate Commerce Commission.
	)	
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

ORDER

This petition is to review a decision of the Interstate Commerce Commission (ICC) permitting American Rail Heritage Ltd., doing business as Crab Orchard and Egyptian Railroad (COE), to acquire and operate 8.53 miles of Illinois Central Gulf Railroad track between Ordill and Mande, Illinois. The ICC decision also dismissed as duplicative an Illinois Central abandonment application for the 8.53-mile segment while granting permission for that railroad to abandon an additional 5.97-mile segment extending from Ordill to Seeley, Il-

*Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

linois. See Appendix A, *infra*. The ICC simultaneously imposed the liberal labor protective conditions established in *Oregon Short Line R. Co. — Abandonment, Goshen,* 354 I.C.C. 584 (1978), on the Illinois Central with respect to the entire 14.5 miles of Seely-Mande track. The State of Illinois, the Illinois Commerce Commission, John W. McGinness, representing the United Transportation Union, and Winston G. Harbischt, representing the Brotherhood of Maintenance of Way Employees, have asked us to set aside the Commission's decision while intervenors Illinois Central and American Rail Heritage have asked us to affirm the decision. The Brotherhood of Local Engineers, a protestant before the Commission, has not joined in the petition for review.

The events leading to the ICC decision began in October 1976 when the Illinois Central filed an application under then Section 1(18) of the Interstate Commerce Act[1] seeking permission to abandon its 14.5-mile branch line between Seely and Mande. In December 1976 COE, not then a "common carrier by railroad" subject to the Interstate Commerce Act, requested authority under Section 1(18) of the Act to acquire and operate the entire branch line, later amending the application to cover only the 8.53-mile Ordill-Mande segment. In April 1977, shortly after the amendment, COE reached an agreement with Illinois Central to purchase this same

[1]P.L. 94-210, the Railroad Revitalization and Reform Act of 1976, amended former Section 1(18) of the Act, which embraced both abandonments and extensions of lines, and divided that Section into a new Section 1(a) covering abandonments and a new Section 1(18) covering extensions. That legislation became effective on November 1, 1976, after the Illinois Central's abandonment application. Former Section 1(18) thus governs the abandonment application of the Illinois Central. That Section of the Interstate Commerce Act and the other statutory provisions involved herein are reproduced in Appendix B hereto.

8.53-mile segment. The ICC subsequently scheduled hearings on the applications of both the COE and the Illinois Central but, on October 10, 1977, before those hearings could commence, the Illinois Central placed an embargo on its Seely-Mande operations due to track conditions. On October 18, the ICC issued a service order temporarily authorizing COE to conduct interstate freight operations over the line between Ordill and Mande. This was the first time that the Commission had authorized COE to be a common carrier by railroad.[2]

The consolidated hearing on the petitions took place before an administrative law judge in Marion, Illinois, on November 7 and 8, 1977. On March 20, 1978, the ALJ issued an initial decision recommending (1) approval of COE's acquisition of the 8.53-mile portion of Illinois Central's 14.5-mile branch line, (2) dismissal of the Illinois Central's application for abandonment of the same 8.53 miles of track, and (3) approval of the remainder of the requested Illinois Central abandonment covering the 5.97-mile segment between Seely and Ordill. On October 10, 1978, the ICC, Division I, upon review of the ALJ's decision held that he did not err in finding that the COE acquisition was properly filed and granted under Section 1(18) of the Act rather than under Section 5(2). Further, it held that the evidence justified abandonment by the Illinois Central of the 5.97-mile Seely-to-Ordill segment and that in view of COE's acquisition of the remaining 8.53-mile segment, the Illinois

[2]COE did operate an intrastate tourist passenger train on the Ordill-Marion segment of the line in question between July 1, 1973, and September 26, 1973. That service came to an end when Illinois Central voided the lease with COE because of a disagreement about backowed rent. The April 1977 agreement between Illinois Central and COE covered trackage rights related to this service and COE thereafter resumed its passenger operations.

Central's application to abandon that stretch of track should be dismissed. The ICC also found that the ALJ erred in confining the *Oregon Short Line* employee protective conditions to employees affected by the 5.97-mile segment of track being abandoned and instead held that all Illinois Central employees who might be harmed by the entire proposed transaction should be protected by the Illinois Central under those conditions. On December 6, the full Commission denied a petition of the four protestants seeking a finding that an issue of general transportation importance was involved.

Petitioners' principal argument is that the ICC should have evaluated COE's application under the more stringent standards of Section 5(2) of the Interstate Commerce Act rather than under Section 1(18). We recently rejected a similar argument in *People of the State of Illinois v. United States,* 604 F.2d 519 (1979), and hold that decision to be controlling here. That opinion involved the acquisition by the Prairie Trunk Railway of a 73-mile segment of main line between Flora and Shawneetown, Illinois, being abandoned simultaneously by the Baltimore & Ohio Railroad Company. As here, it was argued that Prairie Trunk should have proceeded under Section 5(2) instead of Section 1(18), but we rejected that argument, concluding that Section 1(18) covered a "proceeding [which] is concerned with the simple acquisition of a line by a prospective new rail carrier" (at p. 525) and that the transaction proposed was such a simple acquisition despite B & O's concurrent abandonment of the line. Petitioners seek to distinguish *Prairie Trunk* by noting that the acquiring entity there was a new carrier. Yet at the time of its December 1976 application (and April 1977 amendment) under Section 1(18), COE, like the Prairie Trunk was a "prospective new rail line carrier." As of that date, COE had no

operating authority from the Commission and engaged in no interstate operations as a "common carrier by railroad" within the purview of the Interstate Commerce Act. Although as noted, COE had obtained an emergency service car order from the ICC on October 18, 1977, that order authorized it to conduct interstate freight operations over the 8.53-mile line only pending disposition of its application for permanent authority. Thus COE arguably was not a common carrier for purposes of Section 5(2) until the acquisition decision itself became effective on January 10, 1978 (J. App. 76-78).[3]

Even if at the time of its acquisition application under Section 1(18) COE had received ICC authorization to operate as a rail carrier, Section 1(18) would still be applicable. As we noted in *Prairie Trunk,* Section 1(18) "was intended to deal with the acquisition, abandonment and extension of an individual line of railroad and was essentially directed at the transportation-oriented activities of a single rail carrier or applicant" (at p. 525; see also p. 526). *Prairie Trunk* specifically held that the ICC's dismissal of a pending abandonment (here the 8.53-mile segment) while authorizing a simultaneous acquisition by a different entity was consistent with this purpose (at pp. 524, 525). The reasoning leading to that conclusion did not turn on the operating status of the acquiring entity. Indeed, the *Prairie Trunk* case specifically cited the ICC's decision in the present case with approval (at p. 525 n. 13).[4] We

[3]We were advised in the briefs that consummation is awaiting this order.

[4]In the present case the Commission also relied on *Iowa Term. R. Co. Acquisition and Operation,* 312 I.C.C. 546 (1961) and *Okmulgee Northern Ry. Co. Abandonemnt,* 320 I.C.C. 637 (1964) (J. App. 68), both of which we cited with approval in *Prairie Trunk* (at p. 525 n. 12).

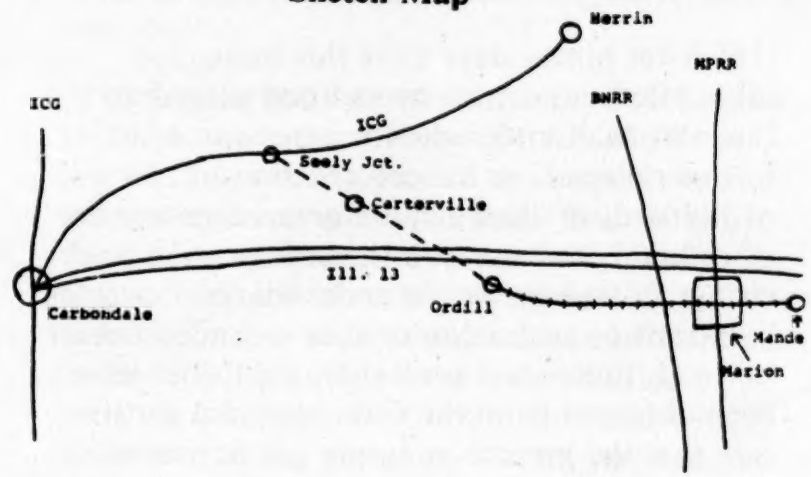
therefore reject petitioners' objection to the procedures employed in this case.

Finally petitioners contend that the ICC approved the acquisition and abandonment while relying on an allegedly erroneous finding that during Illinois Central's recent operation of the 14.5-mile branch line, "income has declined to a point where inevitably operating losses will justify the line's abandonment" (J. App. 69). They insist this finding should be set aside as arbitrary and unsupported by substantial evidence, thereby calling into question the ICC decision as a whole. It is true that the ICC found that the line as a whole generated a profit of $58,548 in 1976 (J. App. 70), but the evidence discussed by both the ALJ and the ICC regarding the necessary maintenance and rehabilitation expenses amply supports the ICC's ultimate finding of inevitable operating losses. Moreover, this determination was only one factor the ICC considered in evaluating COE's acquisition proposal.

The Commission's October 10, 1978, decision is affirmed.

APPENDIX A

Sketch Map



- - - - - - - - Seely-Ordill segment to be totally abandoned.

+-+-+-+-+-+-+-+ Ordill-Mande segment to be acquired by American Rail Heritage, d/b/a Crab Orchard & Egyptian Railroad.

———— Other rail lines.

═══ Illinois Highway 13.

-5-

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Former Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18), provides in pertinent part as follows:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line or railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, or such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

This provision was in effect at the time of Illinois Central's abandonment application of October 1976.

Section 1(18) of the Interstate Commerce Act, as amended by the Railroad Revitalization and Reform Act of 1976, provides in pertinent part as follows:

> (a) No carrier by railroad subject to this part shall—
>
> (i) undertake the extension of any of its lines of railroad or the construction of any additional line of railroad; (ii) acquire or operate any such extension or any such additional line; or (iii) engage in transportation over, or by means of, any such extended or additional line of railroad, unless such additional line of railroad, is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or will be enhanced by the construction and operation of such extended or additional line of railroad. Upon receipt of an application for such a certificate, the Commission shall (A) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of such extended or additional line, (B) send an accurate and understandable summary of such application to a newspaper of general circulation in such affected area or areas with a request that such information be made available to the general public, (C) cause a copy of such summary to be published in the Federal Register, (D) take such other steps as it deems reasonable and effective to publicize such application, and (E) indicate in such transmissions and publication that each interested person is entitled to recommend to the Commission that it approve,

disapprove, or take any specified action with respect to such application.

This provision was in effect at the time of COE's acquisition application.

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), provides in pertinent part as follows:

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)(2) or paragraph (3)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for ownership, management, and operation of the properties therefore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; * * *.

This provision was claimed by petitioners to apply to COE's acquisition.

Unpublished Per Curiam Order
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

November 29, 1979

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

PEOPLE OF THE STATE OF ILLINOIS, et al. Petitioners,	)	On Petition for Review of an Order of the Interstate Commerce Commission.
No. 79-1005 vs.	)	
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Respondent,	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY and AMERICAN RAIL HERITAGE, Intervenors.	)	

This cause came on to be heard on the transcript of the record from the Interstate Commerce Commision, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Interstate Commerce Commission entered in this cause on October 10, 1978, be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

*Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

APPENDIX C

INTERSTATE COMMERCE COMMISON REPORTS

FINANCE DOCKET NO. 27506[1]

PRAIRIE TRUNK RAILWAY – ACQUISITION AND OPERATION – BETWEEN FLORA AND SHAWNEETOWN IN CLAY, WAYNE, WHITE, AND GALLATIN COUNTIES, ILL.

Decided February 17, 1977

1. In Finance Docket No. 27506, certificate issued authorizing the acquisition and operation by Prairie Trunk Railway of a line of railroad between Flora and Shawneetown, Ill., and assignment of certain trackage rights over a portion thereof, subject to certain prescribed conditions.
2. In Finance Docket No.27507, authority granted to Prairie Trunk Railway to issue not exceeding 750,000 shares of no-par common stock with a stated value of $1 per share, the proceeds of which to be used for the acquisition and operation of the line of railroad herein authorized to be acquired, and application in all other respects denied.

[1]This report embraces Finance Docket No. 27507, Prairie Trunk Railway Securities; and Finance Docket No. 27728, Trans-Action Associates, Incorporated—Control—Prairie Trunk Railway; Finance Docket No. 26965, Baltimore & Ohio Railway Company Abandonment Between Rinard and Shawneetown, in Clay, Wayne, White, and Gallatin Counties, Illinois.

3. In Finance Docket No. 27728, authority granted to Trans-Action Associates, Incorporated, to control Prairie Trunk Railway as a wholly owned subsidiary subject to certain conditions.
4. In Finance Docket No. 26965 application of the Baltimore and Ohio Railroad Company for authority to abandon the line of railroad to be acquired by Prairie Trunk Railway dismissed.

Samuel W. Witwer, Jr., for applicants in F.D. Nos. 27506, 27507, and 27728.

Richard B. Allen for applicant in F.D. No. 26965.

Gordon P. MacDougall for protestants in each application.

William J. Scott, Peter A. Fasseas, James R. Sullivan, Hercules F. Bolos, and *Helga Huber* for the State of Illinois and the Illinois Commerce Commission protestants in each application.

Robert L. Graves for protestants in F.D. Nos. 26965, 27506, 27507, and intervener in opposition in F.D. No. 27728.

Byron F. Andrews, Jr., for protestants in F.D. No. 26965 and interveners in support in F.D. No. 27506.

David G. Abraham for interveners in support in F.D. No. 27506.

George P. Sheahan for protestant in F.D. Nos. 26965, 27506, and 27507.

Thomas F. McFarland for intervener in F.D. No. 27506.

Thomas G. Woodall for intervener in support in F.D. No. 27728.

Report of the Commission

Division 3, Commissioners Brown, MacFarland, and Clapp

By Division 3:

These proceedings were heard on separate records but, as they involve matters which are interrelated in effect, are herein consolidated for disposition in a single report.

By application filed December 22, 1971, in Finance Docket No. 26965, The Baltimore & Ohio Railroad Company (B&O or Chessie System), a common carrier by railroad subject to part 1 of the Interstate Commerce Act, seeks a certificate of public convenience and necessity under section 1 (18-20) of the act permitting the abandonment of operations over its branch line between Flora and Shawneetown extending from Station 3869 + 50 near Rinard, Ill., to Station 0 + 00 at Shawneetown, Ill, a distance of 73.27 miles and abandonment of the line itself from Station 3869 + 50 to Station 319 + 13.7 near Junction, Ill., and from Station 36 + 56.2 near New Shawneetown, Ill., to Station 0 + 00, a total distance of 67.91 miles[2]; all in Clay, Wayne, White, and Gallatin Counties, Ill. This proceeding was the subject of an oral hearing before an Administrative Law Judge held at Carmi, Ill., June 19 through June 22, 1972. By report and recommended order served February 14, 1973, the Administrative Law Judge noted that while the volume of traffic handled over the line had been marginal at best, B&O's efforts to exploit the traffic potential in the area had been apathetic. He ques-

[2]The 5.36 miles of line between Station 319 + 13.7 and Station 36 + 56.2 omitted from the line abandonment is owned jointly by the B&O and Louisville and Nashville Railroad Company (L&N).

tioned the need for the $2.5 million capital expenditure for road rehabilitation projected by B&O and, concluding that the branch was capable of generating sufficient freight to sustain its operation, including normalized maintenance, recommended that the application for abandonment be denied. Exceptions to this report and recommended order were filed by applicant B&O to which joint replies were filed by protestants Illinois Agricultural Association, FS Services, Inc., Wabash Valley Service Company, White Valley Farm Bureau, Gallatin Valley Farm Bureau, and Wayne County Farm Bureau; by protestants State of Illinois, Illinois Commerce Commission, Thomas J. Duggan,[3] and J. Thomas McNeal[4]; and by protestants Shawneetown Regional Port District and B&O Concerned Citizens of Southern Illinois.

In F.D. No. 27506, the title proceeding, by application filed October 15, 1973, as amended, Prairie Trunk Railway (Prairie Trunk) of Joliet, Ill., a newly formed corporation organized for the purpose of acquiring and operating railroads, seeks authority pursuant to section 1(18) of the act to acquire and operate the line of railroad proposed for abandonment by B&O in F.D. No. 26965 (the Abandonment case) as well as to acquire through assignment the B&O interst in the 5.36-mile segment of line between Station 319 + 13.7 and Station 36 + 56.2 jointly owned and operated by B&O and L&N. In a separately submitted pleading expressing its support of the Prairie Trunk application B&O requests dismissal of the Abandonment case upon approval of the Prairie Trunk acquisition proposal. B&O further advised of its

[3]Illinois Legislative Director for the United Transportation Union (UTU).

[4]Indiana Legislative Director for UTU.

willingness to assume responsibility for and be subjected to the imposition of those conditions for the protection of adversely affected employees embodied in *Chicago, B. & Q.R. Abandonment,* 275 I.C.C. 700, (the *Burlington* conditions), as a condition of approval of the Prairie Trunk acquisition.

In F.D. No. 27507, by application filed October 15, 1973, concurrently with the application in F.D. No. 27506, Prairie Trunk seeks authority under section 20a of the act to issue 1 million shares of no-par-value common stock with a stated value of $1 per share and a secured 15-year promissory note[5] in principal amount not exceeding $650,000 bearing an annual interest rate 1 1/2 percent above the prevailing New York (Chase Manhattan Bank) prime interest rate from time to time in effect. These securities represent the initial capitalization of Prairie Trunk. Initially Prairie Trunk proposes to issue 100,000 shares of the no-par common stock and the $650,000 promissory note to Trans-Action Associates, Incorporated (Trans-Action), of Joliet, Ill., for $750,000 in cash or equivalent assets. Upon the issuance of these securities, Prairie Trunk would become a wholly owned subsidiary of Trans-Action.[6]

The applications in F.D. No. 27506 (the Acquisition case) and F.D. No. 27507 (the Securities case) were the subject of an oral hearing on a consolidated record held June 26 and 27, 1974, at Fairfield, Ill., before a second Administrative Law Judge not previously involved in the Abandonment case. By initial decision served June 10,

[5]Applicant's originally filed request to issue secured 5-year notes was apparently modified as reflected in oral testimony and a submitted exhibit to a proposed 15-year secured promissory note.

[6]Prairie Trunk the shell corporation, was, in fact, created by Trans-Action interests.

1975, the Administrative Law Judge approved the section 1(18) acquisition and operation proposed by Prairie Trunk in F.D. No. 27506 subject to (a) the subsequent approval by the Commission of an appropriate application under section 5(2) of the act by Trans-Action to control Prairie Trunk (b) the *Burlington* conditions for the protection of railway employees, the expense of which to be borne by the Chesssie System (B&O), (c) the further condition that wages to be offered by Prairie Trunk for jobs formerly covered by union contract shall not be reduced below the level now in force under such contracts, (d) the submission of satisfactory proof of the Commission that the sum of $750,000 pledged to Prairie Trunk by Trans-Action has been reduced to cash and placed at the disposal of Prairie Trunk for the uses and purposes set forth in the application, and (e) the condition that for a period of 5 years from the consummation date of the acquisition, no abandonment application relating to the subject line of railroad may be filed by Prairie Trunk prior to a bona fide offer of resale to any party to the proceeding at a purchase price no less favorable than that approved for payment to B&O adjusted to Consumer Price Index changes. The request for dismissal of the Abandonment case was denied by the Administrative Law Judge as being a matter pending before the Commission and not properly before him. In F.D. No. 27507 the issuance of 1 million shares of common capital stock and secured notes not to exceed $650,000 in principal amount proposed by Prairie Trunk was authorized by the Administrative Law Judge.

Exceptions to the initial decision of the Administrative Law Judge served June 10, 1975, were filed by applicant Prairie Trunk, jointly by protestants Thomas J. Duggan and J. Thomas McNeal, and separately by protestant Il-

linois Commerce Commission. A joint reply to applicant's exceptions were filed by Thomas J. Duggan and J. Thomas McNeal. Applicant replied to protestants' exceptions, and B&O Concerned Citizens of Southern Illinois, intervener in support of Prairie Trunk applications, replied to the exceptions of Illinois Commerce Commission.

In F.D. No. 27728, by application filed September 5, 1974, Trans-Action, a noncarrier holding company controlling Louisiana Midland Railway Company (Louisiana Midland), a common carrier by railroad subject to part 1 of the act, as a wholly owned subsidiary, seeks authority under section 5(2) of the act to own and control more than one regulated common carrier by railroad, a condition which in view of Trans-Action's relationship with Prairie Trunk would be a resulting consequence of approval of the Acquisition and Securities cases. Protests were filed by the Railway Labor Executives' Association (RLEA), the Congress of Railway Unions (CRU), jointly by Thomas J. Duggan and J. Thomas McNeal (UTU), and jointly by the State of Illinois and the Illinois Commerce Commission (Illinois). RLEA and CRU expressed concern as to the possibility that approval of the application might have an adverse effect upon employees. Their protests were directed solely to this issue with both seeking the imposition of employee protective conditions in the event of approval of the application, RLEA seeking imposition of the conditions contained in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (the *New Orleans* conditions) and CRU seeking imposition of those contained in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177 (the *Oklahoma* conditions).

By order of the Commission, Division 3, dated March 10, 1976, the proceeding in F.D. No.27728 (the Control

case) was set for handling under the modified procedure. The order raised several questions relating to the financial status of Trans-Action, the interest payment obligation to be imposed upon Prairie Trunk by its parent, the necessity for imposing labor protective conditions and if so the choice thereof, and indicated a need for more recent information as regards operations over the Flora-Shawneetown line. Pursuant to the March 10, 1976, order an initial statement under modified procedure containing a verification of the factual allegations made therein to the best of the knowledge and belief of the affiant[7] was submitted by Trans-Action. Protestants Illinois and UTU submitted a joint statement in reply to applicant's initial statement. A rebuttal statement containing a verification with an affirmative assertion of knowledge of the matters and things discussed therein on the part of the affiant as well as an assertion of the truth and correctness to the best of affiant's knowledge and belief of all previously submitted representations, attachments, and financial statements was filed by applicant.

A motion to strike certain portions of applicant's verified rebuttal statement was filed jointly by Illinois and UTU, and applicant replied thereto. Protestants contend that the portion of applicant's rebuttal verification which refers to previously submitted materials constitutes improper rebuttal. They assert that applicant's initial statement was improperly verified and that the entire statement should be considered as argument only. They further contend that as the exhibits attached to the rebuttal statement were not prepared by the affiant, they should be stricken as evidence. The language of the rebuttal verification to which protestants object was added by applicant to clarify its initial

[7]The verification was given by Craig E. Burroughs, president of Trans-Action as well as Prairie Trunk and Louisiana Midland.

statement verification in response to the criticism of that verification contained in protestants' reply statement. We consider applicant's initial verification as clarified by its rebuttal verification to be in substantial compliance with rule 50 of the Commission's General Rules of Practice (49 CFR 1100.50), cf. *Pyramid Van Lines, Ext.— Elimination of Gateways,* 107 M.C.C. 812, 815. The objected-to exhibits represent a response to matters raised in protestants' reply statement and constitute proper rebuttal. In all respects the motion to strike is overruled.

Petitions for leave to intervene and to submit tendered statements in the Control case were filed jointly by Illinois Agricultural Association and its affiliates FS Service, Inc., Wabash Valley Service Company, White County Farm Bureau, Gallatin County Farm Bureau, and Wayne County Farm Bureau (IAA), and separately by Shawneetown Regional Port Districtd (Port District). As petitioners are parties to the related Abandonment and Acquisition cases, their requests for intervention are granted and their tendered statements, IAA's statement of position and Port District's statement in support of applicant, are accepted for filing.

Exceptions to the Initial Decision in the Acquisition and Securities Cases

In its exceptions to the initial decision of the Administrative Law Judge in the Acquisition and Securities cases, Prairie Trunk objects to the imposition of the minimum wage condition for jobs formerly covered by union contract contending that the Commission lacks authority to prescribe or dictate wages in this manner and that the condition does violence to the Railway Labor Act (45 U.S.C.

151) and interferes with free collective bargaining. It notes that the wages of existing employees[8] affected by the transaction will be protected through the imposition of the *Burlington* conditions and that the minimum wage condition to which it objects can only apply to employees to be recruited by Prairie Trunk subsequent to approval of the Acquisition case by the Commission. It further urges the inclusion of specific affirmative findings directing the continuation of existing through rates, routes, and divisions presently applicable to the subject line of railroad and authorizing the assumption by Prairie Trunk of all rights and obligations of B&O in the 5.36-mile segment of line owned jointly with L&N. Such findings it believes would insure stability and avoid ambiguity and controversy.

In reply UTU contends that the labor protective conditions imposed by the Administrative Law Judge are less than adequate and that adoption of Prairie Trunk's exceptions in this regard would be inequitable and unjust. It points out that UTU and other labor organizations have collective bargaining agreements with B&O covering employment on the involved line of railroad, that the proposed operations of Prairie Trunk would rely upon and be strongly integrated with B&O, and that Prairie Trunk has expressed its willingness to give preference in employment to present B&O employees. It asserts that in the exercise of its broad powers under section 1(18-20) of the act, the Commission clearly has authority to impose a maintenance-of-wage-levels condition as a condition for approval of a proposed acquisition. Further, it urges that Prairie Trunk be required to

[8]Refers only to B&O employees as Prairie Trunk presently has no employees.

collectively bargain with representatives of the present employees working on the subject line of railroad. It expresses no objection to the imposition of the standard DT&I routing conditions requested by Prairie Trunk but contends that this demonstrates the true section 5(2) character of the proceeding. As to specific authorization for the assumption by Prairie Trunk of B&O's rights and obligations under its joint trackage agreement with L&N, protestant believes the participation of L&N is necessary for such a determination.

Illinois in its exceptions questions the financial abililty of Prairie Trunk to maintain service on the Flora-Shawneetown line and requests the Commission to make positive findings as to the financial viability of Prairie Trunk's proposed operation. It further excepts to the environmental findings of the Administrative Law Judge to the effect that approval of the subject applications will not have a significant effect upon the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, contending that neither a negative Threshold Assessment Survey nor draft environmental impact statement were available at the hearing, or within the required period prior thereto, and that Prairie Trunk's proposed operations will differ significantly from that presently being provided by B&O. In addition it raises certain procedural matters which will be discussed below.

UTU excepts generally to the approval of the subject applications urging that they be denied or dismissed. It challenges the legal premise accepted in the initial decision that a new carrier (Prairie Trunk) may under section 1(18) acquire and operate a line of railroad without the issuance pursuant to a section 1(18) application of a

certificate of abandonment to the former operator (B&O), contending that the decision in *Cadillac & Lake City Ry. Co. Acquisition and Operation,* 320 I.C.C. 617, wherein the acquisiton was approved and the abandonment dismissed, which was rendered by an employee board and relied upon by the Administrative Law Judge, was erroneous in its adoption of this practice and contrary to the manifest weight of Commission precedent, citing *Okmulgee Northern Ry. Co. Abandonment,* 320 I.C.C. 637, 638-40. It asserts that in apprroving the proposed acquisition the Administrative Law Judge misconceived the primary justification for the application to be cost reduction when in fact it is based upon a projected increase in traffic characterized as fantastic and not supported by the evidence. It contends that the capability of Prairie Trunk to render the proposed service has not been established. Protestant concurs and adopts the position of Illinois as regards the environmental findings. It asserts that as the proposed transaction constitutes an acquisition rather than an abandonment, should it be approved, the appropriate employee protective conditions to be imposed are the *New Orleans* conditions rather than *Burlington* conditions. It further requests that the Commission under its broad section 1(18) powers as a condition of approval require Prairie Trunk to collectively bargain with representatives of present employees of the line. The procedural matters discussed below raised by Illinois were also raised by this protestant.

In reply Prairie Trunk insists that the exceptions of protestants are without merit. It emphasizes public and shipper support for the proposed acquisition and notes the limited interest of protestants UTU and Illinois. It contends that there is nothing improper with the pro-

cedure utilized in *Cadillac & Lake City, supra,* and that its assumption of operations over the Flora-Shawneetown line preclude the occurence of any abandonment by B&O. It asserts that the viability of its financial position was adequately supported by evidence of record unchallenged by protestants, and that the questioning of its traffic projections by protestants is inappropriate and inconsistent with their optimistic view of the line's traffic potential offered in the Abandonment case. It considers the environmental determination of the Adminis-ministrative Law Judge to be both reasonable and correct in that the subject transaction involves the mere substitution of one carrier for another in the performance of operations over the same track. As to the labor protective conditions, it points out that the *Burlington* conditions imposed by the Administrative Law Judge are applicable to all employees involved in B&O Operations on the Flora-Shawneetown line, that the *Burlington* conditions are similar to the other employee protective conditions sought by protestants, and that the benefit to be afforded affected employees, through the imposition of standard employee protective conditions other than the *Burlington* conditions is not readily apparent.

B&O Concerned Citizens of Southern Illinois (Concerned Citizens) in reply to the exceptions of Illinois expresses its satisfaction with the manner in which the Administrative Law Judge dealt with the subject of applicant's financial viability and disposed of the environmental issue. As the Prairie Trunk proposal constitues a continuation of existing railroad operations, it believes no further amplification is required of the environmental issue. It urges that the initial decision be affirmed.

Procedural matters raised on exceptions.— Protestants Illinois and UTU request the Commission to take official notice of the United States Railway Association (USRA) recommendation released June 23, 1975, to exclude the Flora-Shawneetown line (Trackage Coordination Project IL-5) from the Final System Plan containing the comment/reason that Illinois Central Gulf Railroad (ICG) is interested in acquiring the entire line and intends to deal directly with B&O and file a proposal with this Commission. Protestants urge that further action in the subject proceedings be deferred pending the filing of the ICG application. In reply, Prairie Trunk asserts that the comment/reason indicated for the USRA recommendation is based on speculation and misinformation. It notes that B&O has taken no action inconsistent with the proposed acquisition and has in fact reiterated its intention to sell the line to Prairie Trunk upon receipt of appropriate Commission authorization.[9] No such proposal has been submitted to the Commission by ICG as of this date, the absence of which relegates the matters sought to be officially noticed into the realm of pure speculation meriting no further discussion. The requeste for official notice is denied.

Protestants further seek the consolidation of the Acquisition and Securities cases with the Control and Abandonment cases as well as two other B&O abandonment applications, F.D. No. 26745, Baltimore & Ohio Railraod Company Abandonment Between Coal Shaft

[9]Attached to the Prairie Trunk reply is a letter dated July 21, 1975, bearing the signature of the general attorney for B&O asserting that B&O has no plans or intentions of selling the subject line to ICG and confirming its intention to honor its agreement with Prairie Trunk.

and Beardstown in Sangamon and Cass Counties, Illinois, and Docket No. AB-19 (Sub-No. 27), Baltimore & Ohio Railroad Company Abandonment Between Flora and Sangamon Junction in Clay, Effingham, Fayette, Shelby, Christian, and Sangamon Counties, Illinois. As previously indicated the first four proceedings to which protestants refer have herein been consolidated for disposition in a single report. The later two abandonment applications involve connecting rail line segments northwest of Flora extending between Flora and Beardstown. Previous requests for consolidation of the three B&O abandonment applications in F.D. No. 26745, Docket No. AB-19 (Sub-No. 27), and F.D. No. 26965 independently raised in various proceedings have repeatedly been denied.[10] Protestants offer no substantial reasons as to why a reversal of the previous refusals to consolidate is in order. The request for consolidation of the three B&O abandonemnt applications is denied.

The Prior Administrative Law Judge Reports And the Prairie Trunk-Trans-Action Proposals

The facts set forth in the report of the Administrative Law Judge issued in the Abandonment case and the initial decision of the Administrative Law Judge issued in the Acquisition and Securities cases have been accurately stated in all material respects, and, as supplemented and expanded upon herein, are adopted as our own. To the extent facts are restated, we have deemed it necessary for clarity of discussion.

[10]See report and recommended order of the Administrative Law Judge served February 14, 1973, in F.D. No. 26965; order of the Commission, Commissioner Tuggle, dated June 17, 1975, in all threee proceedings; and the order of the Commission, Division 3, Acting as an Appellate Division, dated May 18, 1976, in F.D. No. 26745.

Pursuant to a Memorandum of Understanding dated July 25, 1973, Trans-Action and B&O have entered into an agreement whereby Trans-Action is to acquire the B&O line of railroad between Flora and Shawneetown as well as the entire B&O interest in the 5.36-mile segment of line between Junction and New Shawneetown which it owns jointly with L&N for the sum of $500,000. The $500,000 is to be payable in cash with $100,000 due upon receipt of approval by this Commission of the proposed acquisition and $400,000 to be paid upon commencement of operations over the newly acquired line or 180 days after final Commission authorization, whichever first occurs.

Trans-Action proposes to assign the assets and interest of B&O to be acquired plus $250,000 to Prairie Trunk in exchange for 100,000 shares of Prairie Trunk no-par-value common stock and a secured $650,000 promissory note to be issued pursuant to the Securities case. The principal amount of the promissory note would be payable in 15 years and bear interest at a per annum rate 1½ percent above the prevailing New York (Chase Manhattan Bank) prime interest rate from time to time in effect with interest payable semiannually. The $250,000 is to provide Prairie Trunk with the necessary capital to meet projected start-up expenditure, equipment acquisition, construction, and working capital requirements. These requirements are identified as $20,000 for tools, shop machinery, and maintenance-of-way equipment; $15,000 for motor vehicles for agency, mechanical, and roadway maintenance forces (one mobile station van, two 1½-ton pickup trucks, and one 2½-ton Hi-rail truck); $6,000 for office furnishings and equipment; $20,000 for communications equipment; $89,000 for noninterchangeable communications equip-

ment; $89,000 for noninterchangeable freight equipment to service local movements; $5,000 for organizational expenses; and the balance of $95,000 for working capital purposes.[11] Trans-Action will also make available to Prairie Trunk assets in its possesion such as 10 interchangeable 40-foot boxcars and various types of track materials when and as needed.[12]

The $750,000 required to finance the B&O acquisition and the initial Prairie Trunk capital will be generated by Trans-Action through the sale of steel rail and related materials inventories which are carried on the financial statements of Trans-Action at nominal values. As of April 19, 1976, negotiations were pending for the sale of approximately 2,059 tons of rail and rail fastenings, representing the balance of Trans-Action's unsold inventories of these items, which if successful would yield to Trans-Action approximately $900,000.

Trans-Action's balance sheet as of November 30, 1975, indicates total assets of $471,436, made up of cur-

[11]In the application as originally filed $60,000 was designated for the acquisition for three used locomotive units and $40,000 for the construction of shop and office facilities at Shawneetown. Trans-Action owns one locomotive unit which it will make available to its subsidiary and has access to other units which can be leased from Peabody Coal Company and B&O as needed. The contemplated shop and office facilities will not be needed initially. Shop space at the B&O diesel servicing facility at Flora will be available for heavy maintenance requirements.

[12]Trans-Action indicates that the use of these assets by Prairie Trunk as well as its use of the locomotive unit referred to in footnote 11 will not require an expenditure of cash on the part of Prairie Trunk. The locomotive will be considered as an additional capital contribution by Trans-Action for which additional shares of Prairie Trunk stock will be issued. The manner by which Trans-Action will be compensated for the use of the other assets, if such compensation is contemplated, was not indicated.

rent assets of $43,450; investments of $424,833, consisting of railroad equipment $6,825,[13] railroad real estate $14,508, capital stock of Great Plains Railway $3,000, and capital stock of Columbus & Greenville Railway $400,500[14]; and property and equipment (net) $3,153. Current liabilities totaling $154,514 include accrued wages of $48,475 and estimated income tax liability of $86,000; long-term liabilities representing loan from officer and accrued interest thereon amount to $21,601; while shareholders' equity consisting of capital stock of $3,200 and retained earnings of $292,121 totals $295,321. For the 6 months ended November 30, 1975, Trans-Action's gross income totaled $413,033, of which $406,333 represented the sale of rails. Net income for the period after provision for income taxes amounted to $294,340.

The railroad operation proposed by Prairie Trunk will be directed primarily at local shippers and the expansion, promotion, and development of rail movements local to the line. While as indicated in appendix A hereto the number of carloads handled by B&O over its Flora-Shawneetown branch for the years 1969 through 1975 has with the exception of 1970 trended downward with consistency, because the emphasis of its locally based short-line railroad service will be upon local shippers and local transportation needs, Prairie Trunk anticipates

[13]Includes rail and track fastenings valued on the books at $1.

[14]Represents cost of 200,250 shares of common stock at $2 per share. Of these, 125,000 were held in a voting trust and offered for sale to local investors in Mississippi at $2 per share. By February 22, 1976, sale of the 125,000 shares was completed and the proceeds turned over to Trans-Action.

Trans-Action's investment in the capital stock of Louisiana Midland Railway being carried on the equity method is valued at zero as of the balance sheet date.

an immediate and dramatic expansion in the volume of traffic to be move over the subject line. Prairie Trunk's projections as to traffic volume and gross operating revenues are set forth in appendix B. Traffic volume projections are broken down by commodities. For comparative purposes appendix B also contains a commodity breakdown of the traffic handled by B&O for the years 1969, 1970, and 1971. Based on these traffic estimates Prairie Trunk anticipates profitable operations within 2 years of the institution of its service. Its financial projections are outlined in the *pro forma* income statement set forth in appendix C.

Trans-Action's objective in its control and operation of Prairie Trunk will not be to accumulate and distribute short-term profits but rather to enhance the asset value of its subsidiary through the development of a responsible and enduring service-oriented short-line railroad.

Position of Protestants and Other Parties

Illinois. — Protestant vigorously opposes the Abandonment case for the reasons set forth in the February 14, 1973, report and recommended order of the Administrative Law Judge, particularly the strong public need for continued rail service on the Flora-Shawneetown line and the potential for substantial increases in traffic that exists along the line. It opposes the Acquisition and Control cases because it considers Trans-Action and Prairie Trunk to be in a financially weak position and not entirely capable of providing the rail service required on the line. Protestant indicated its support for the acquisition of the Flora-Shawneetown line by another rail carrier not a party to these proceedings.

UTU. — UTU opposes the Abandonment case for the same reasons indicated by Illinois. For similar reasons it also opposes the Acquisition and Control cases. Protestant questions the reliability of the Prairie Trunk traffic projections as well as applicant's ability to perform the rail service it proposes. UTU considers the *Burlington* conditions inappropriate for protecting the interests of employees in the pending proceedings.

Concerned Citizens. — Concerned Citizens, a group of approximately 100 shippers and consignees located in communities on the Flora-Shawneetown line, actively opposes the Abandonment case but supports the acquisition and operation of the subject line by any qualified and responsible railroad. It supports the proposed Prairie Trunk acquisition as the best available alternative for the improvement of a needed rail service essential to the economic maintenance and development of its area. It considers the financial conditions imposed by the Administrative Law Judge in the initial decision of June 10, 1975, adequate to insure the financial viability of the proposed Prairie Trunk operation.

IAA. — These affiliated farm service organizations representing farmer members located in southern Illinois vigorously oppose the Abandonment case. Because of the failure of B&O to provide adequate car service and track maintenance on the subject line, IAA reluctantly supported the Acquisition case proposals. It is particularly anxious that its members are assured of a reliable rail transportation service rendered by a financially responsible carrier. Based on information contained in the joint reply statement submitted by Illinois and UTU in the Control case, IAA is no longer satisfied that Trans-Action is responsible either financially or otherwise to insure that adequate rail transportation service will be available to its members. For this reason it op-

poses Trans-Action's application for control and no longer supports the proposed acquisition.

Port District — This operator of a public port facility on the Ohio River at Shawneetown stands in opposition to the Abandonment case but fully supports the Acquisition and Control cases. It considers the proposed short-line railroad to be the last hope for regular and dependable rail service for shippers and receivers in its region. It is aware of and has identified several new development projects at its port facility which will require the availability of adequate rail service.

Discussion and Conclusions

At the outset, we take cognizance of the fact that while consummation of the Louisiana Midland rail line acquisition[15] occurred on April 28, 1974, some 2 months prior to the oral hearing in the Acquisition and Securities cases and some 4 months prior to the formal filing of the Control case herein under consideration, the parent-subsidiary relationship between Trans-Action and Louisiana Midland and Trans-Action and Prairie Trunk was fully disclosed at the oral hearing and the subject of careful and intensive examination. Indeed the condition imposed by the Administrative Law Judge in the initial decision served June 10, 1975, requiring Trans-Action to file and subsequently secure Commission approval of the common control relationship which would result from approval of the Prairie Trunk acquisi-

[15]This transaction was approved in F.D. No. 27450, *Louisiana Midland Railway Company — Acquisition and Operation of Line of Railroad in Winn, Grant, LaSalle, Catahoula, and Concordia Parishes, Louisiana* (not printed), decided March 13, 1974, by the Commission, Review Board Number 5, wherein Louisiana Midland was authorized to acquire a described line of railroad from Illinois Central Gulf Railroad Company.

tion proposal reflected a formalization of Trans-Action's clearly expressed intent in this regard. Although Louisiana Midland is currently engaged in the performance of a short-line rail transportation service similar in terms of physical operation to the type of short-line railroad operation herein proposed by Prairie Trunk, the 76-mile line of railroad between Packton and Vidalia, La., located in the northeast portion of central Louisiana over which it operates is separated geographically from the southeastern Illinois line of railroad and area of service identified with the proposed Prairie Trunk operation by well in excess of 500 miles. Assuming that approval of the proposed Prairie Trunk acquisition is justifiable, the two railroad operations are so clearly separate and unrelated as to merit our concluding that common ownership and control of Louisiana Midland and Prairie Trunk by Trans-Action will have no adverse competitive effect upon the utilizers of their respective services.

In our consideration of the Prairie Trunk acquisition proposal and its impact upon the interest of the public, two principal questions have been raised. First, accepting the fact that Prairie Trunk and its parent are sincere in their desire to improve and expand rail service on the subject line, is Prairie Trunk capable in terms of operating competence and financial ability of fulfilling its objectives or at a minimum of insuring the continued availability of adequate rail service on the line? Second, if the undertaking of this endeavor is within the capability of Prairie Trunk, whether the conditions imposed by the Administrative Law Judge in his initial decision served June 10, 1975, for the protection of railroad employees affected by the acquisition should be modified?

Confronted by the consistent erosion in the volume of traffic handled by B&O on its Flora-Shawneetown line, the repetitious shipper complains as to the steady deterioration of service on the line, the negative approach taken by B&O in its operation of the line as reflected by weak and ineffective attempts to develop traffic and a persistency of effort to end its operating responsibility for the line either through abandonment or sale, it is quite evident that the service envisioned by the Prairie Trunk proposal would be a significant improvement over that presently available on the line and of substantial benefit to shippers in the area. Clearly, if Prairie Trunk though initially dependent upon Trans-Action for managerial direction and financial resources is able to function in its own capacity as an independent entity and a financially responsible short-line railroad, the best interest of the public would be served by approval of the proposed acquisition.

Trans-Action is a transportation consulting firm specializing in light-density rail line problems. Since its organization in May 1971,[16] it has been engaged in the development of short-line feasibility studies (including engineering reports), the financing of new railroad ventures, and, in the course of assisting interested parties involved in transportation regulatory matters, in the preparation of pleadings, analyses, and testimony. It has functioned as a consultant and provided complete organization and management services for a variety of short-line railroads. In view of this background, particularly that relating to the organization and operation of short-line railroads, we are satisfied that Trans-

[16]Trans-Action was incorporated under the laws of Illinois on May 28, 1971, as Faburr Fund, Inc. Its present name was adopted by charter amendment filed January 10, 1973.

Action possesses the experience and knowledge required to provide Prairie Trunk with the kind of responsible leadership and management necessary to undertake and successfully pursue the short-line railroad operation proposed herein. Cf. *Cambria & I. R. Co. Control,* 275 I.C.C. 360, 365.

The real applicant in the acquisition proceedings is Trans-Action.[17] It proposes to utilize as the vehicle through which it will own and operate the line of railroad to be acquired a newly created wholly owned subsidiary. We recognize, however, that the subsidiary, Prairie Trunk, represents an independent corporate entity separate and distinct from Trans-Action. It is particularly for this reason that Trans-Action has an obligation to the shipping public served by the subject line to insure that its subsidiary is adequately capitalized and financially independent.

Trans-Action has indicated that its interest in the Flora-Shawneetown line is not for short-term profits but rather for the preservation, enhancement, and long-term development of a responsible public service corporation in the short-line railroad field. To finance this undertaking Trans-Action proposes to provide Prairie Trunk with the equivalent of $750,000 in assets and cash to underwrite Prairie Trunk's anticipated capital and operating funding requirements, with the understanding that additional resources will be made available if needed. From the financial information submitted in these pro-

[17]The agreement to acquire the B&O Flora-Shawneetown branch is between Trans-Action and B&O. Prairie Trunk is not a party to that agreement, but through assignment from Trans-Action will acquire the rail line in exchange for securities. While the authority requested in the Acquisition case is technically inaccurate, corrective action need not be taken as the intent of the acquisition proposal is clear.

ceedings, we are satisfied that Trans-Action is in a position to provide Prairie Trunk with this initially suggested $750,000 funding requirement.

Unfortunately as proposed in the Securities case the financing of Prairie Trunk will consist of $100,000 in equity capital and $650,000 in secured interest-bearing debt. Such a financial arrangement is hardly reassuring, for it imposes serious limitations upon the financial independence of Prairie Trunk as a separate corporate entity and subjects its rail operation to an unnecessary interest expense burden. In the face of the speculative uncertainties inherent in the optimistic traffic projects of Prairie Trunk, and, as suggested by the evidence presented in the Abandonment case, the potential necessity to incur substantial expenditures for rehabilitation and maintenance of the line, it is particularly important that the fledging Prairie Trunk operation be financially flexible.

To provide Prairie Trunk with an acceptable degree of financial flexibility and independence, it is necessary that its initial capital structure be simplified by eliminating the $650,000 debt proposal and requiring an equity investment by Trans-Action in the common stock of Prairie Trunk of $750,000. Elimination of the $650,000 promissory note, which was to be secured by all of the physical property transferred by Trans-Action to Prairie Trunk, will have a twofold effect. First, it will provide Prairie Trunk with a collection of assets totally unencumbered by debt representing a resource by reason of which additional financing, when and if required, from parties other than Trans-Action may be secured. Second, it will remove a $65,000 annual interest

expense burden,[18] an amount representing approximately 15 percent of the projected expenses estimated by Prairie Trunk for its first year of operation. Notwithstanding the fact that interest payments due its parent corporation could readily be deferred by Prairie Trunk, the expense represents a legally enforceable legitimate charge against income and imposes an unnecessary burden and needless obstacle to the financial health of the Prairie Trunk rail operation.

While recognizing the Prairie Trunk proposal to be an attempt to upgrade the level of service available on the Flora-Shawneetown line, an effort which should be encouraged, we are fully aware of the many uncertainties which surround the projected operation. We are also aware that the liquidation value of the steel rail and other assets to be acquired by Prairie Trunk far exceeds the $500,000 purchase price. The shipping public has a decided interest in the continuation of a Flora-Shawneetown rail service and should be afforded some measure of assurance that future rail service on the line will not be jeopardized because of an irresponsible or underfinanced ownership or a lack of sincerity or commitment on the part of the new operators. The broadening of Prairie Trunk's equity capital base will enhance its financial stability and independence providing it with a measure of insulation from the activities of its parent. To avoid the temptation of a handsome profit through abandonment and liquidation, we will retain the 5-year condition imposed by the Administrative Law Judge in the initial decision served June 10, 1975 which preempts

[18]Based on Prairie Trunk's pro forma income statement projection.

the filing of an abandonment application prior to a bona fide offer of resale to any party herein. As a caveat to Prairie Trunk and its parents, we will not look with favor upon any future abandonment proposal which may result in a substantial profit arising out of the liquidated scrap value of the line, particularly if the public demonstrates an active interest in continued rail service.

While UTU questions the technical propriety of the manner in which the Administrative Law Judge disposed of the Acquisition case, it is clear that the issues raised — i.e., (1) that an abandonment must be authorized before an acquisition can be approved, and (2) that the proposed transaction is subject to section 5(2) of the act rather than section 1(18) — are actually directed at the employee protection issue, specifically the nature and extent to which conditions for the protection of employees should be imposed. Pursuant to section
position by the Commission of employee protective conditions is mandatory in a section 5(2) transaction, whereas in a section 1(18) proceeding the imposition of such conditions is solely within the discretion of the Commission. See *Interstate Commerce Commission* v. *R. Labor Executives Assn.*, 315 U.S. 373 (1942).

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[19]Section 5(2)(f) states:

As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment***.

Section 5(2)(a) vests jurisdiction in the Commission to authorize:

> * * * any carrier, or two or more carriers jointly, to purchase * * * the properties, or any part thereof, of another [carrier] * * *.

On the other hand section 1(18) provides in part:

> * * * no carrier by railroad subject to this part * * * shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the * * * operation * * * of such additional or extended line of railroad * * *.

Conceivably, although not specifically asserted by UTU, the failure of the Administrative Law Judge to formally approve the B&O abandonment application lends credence to the contention that the subject proceeding deals with a 5(2)(a) purchase application rather than a 1(18) application to acquire and operate, the latter apparently being dependent upon a prior or simultaneously approved abandonment. As a section 5(2) transaction the requirements of 5(2)(f) mandating the imposition of employee protective conditions would be applicable. Contrary to the contention of UTU, abandonment authorization is not an essential prerequisite to approval of a 1(18) acquisition or operation proposal, although a close relationship between these types of proceedings is clearly recognizable. See in addition to *Cadillac & Lake City Co. Ry. Co. Acquisition and Operation, supra,* to which UTU takes strong exception, *Iowa Term. R. Co. Acquisition and Operation,*

312 I.C.C. 546, in which a 1(18) acquisition was approved without even the filing of a related abandonment application.

Further, while on the basis of the statutory language it is understandable that a degree of confusion exists as to whether section 1(18) or 5(2) applies to the proposed acquisition, a distinction between the types of proceedings to which the respective provisions are applicable has been recognized. On the basis of congressional intent we have found section 5(2) to be the appropriate provision for dealing with the unification of existing railroad enterprises, as in the case of consolidation or merger. *Okmulgee Northern Ry. Co. Abandonment, supra,* 639-640; see also *Tennessee Central Ry. C. Abandonment,* 334 I.C.C. 235, 245; and *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 331 I.C.C. 151, 156-157. Section 1(18), on the other hand, is intended to deal with the abandonment, acquisition, and extension of an individual line of railroad and is essentially directed at the transportation-oriented activities of a single rail carrier or applicant; cf. *Okmulgee Northern Ry. Co. Abandonment, supra,* 639-640; and *Iowa Term. R. Co. Acquisition and Operation, supra,* 548-549. In its present condition Prairie Trunk stands as a noncarrier seeking to acquire a line of railroad. As a noncarrier[20] it is not subject to section 5(2) and is only subject to 1(18) inasmuch as, upon approval of the acquisition, it proposes to conduct operations over the Flora-Shawneetown line. *Iowa Term R. Co. Acquisition and Operation, supra,* 548-549. The proposed acquisition

[20]Trans-Action as a holding company is also a noncarrier and, accordingly, is not subject to 1(18) or 5(2) as a carrier by railroad. It is, however, subject to 5(2) by virtue of its holding company status.

does not contemplate merger or unification of existing rail enterprises, but rather is concerned with the simple acquisition of a line by a prospective new rail carrier. We are satisfied that section 1(18) rather than section 5(2) is the most appropriate provision to deal with the type of transaction herein pending.

When in the exercise of our discretion in dealing with a section 1(18) application we have concluded that protection should be afforded employees adversely affected by the proposal, it has been our practice to impose the *Burlington* conditions. Notwithstanding the unsuccessful effort of UTU to subject the proposed Flora-Shawneetown line acquisition to the requirements of section 5(2)(f), we feel constrained to recognize that the protections afforded adversely affected employees under the *Burlington* conditions do in fact satisfy the statutory requirements of section 5(2)(f) no less than do the *Oklahoma* or *New Orleans* conditions which are normally imposed in a 5(2) proceeding.[21] Indeed considerable similarity between the *Burlington, Oklahoma,* and *New Orleans* conditions exists, with the *Burlington* conditions being directed at a single, individual rail carrier whose employees may be adversely affected by approval of a proposed transaction whereas the *Oklahoma* and *New Orleans* conditions are directed at several rail carriers whose employees could be so affected.

As Prairie Trunk is not yet an operating organization and currently employs no personnel and as Trans-Action being a noncarrier holding company is not engaged in operations as a common carrier by railroad, the only

[21]SEE PARTICULARLY *Burlington* conditions (1) and (2) which provide wage guarantee protections for a period of 4 years from the effective date of the Commission's order, *Chicago, B. & Q. R. Co. Abandonment, supra, 704-705.*

employees who might be adversely affected by our approval of the proposed acquisition are those presently in the employ of B&O, particularly those currently engaged in the operation of its Flora-Shawneetown branch. B&O has expressed its willingness to assume the responsibilities imposed by the *Burlington* conditions in the event of approval of the proposed acquisition. The Administrative Law Judge in his initial decision of June 10, 1975, imposed the *Burlington* conditions as a condition of his approval of the transaction, the expenses of which to be borne by B&O. While UTU expresses dissatisfication with the *Burlington* conditions, revealing a preference for the *New Orleans* conditions, it failed to indicate wherein the *Burlington* conditions are inadequate as opposed to the *New Orleans* conditions or to specify why under the circumstances here present *New Orleans* would be more appropriate than *Burlington* for the subject transaction. We believe that the interests of employees who may be affected by the proposed transaction should be protected and that imposition of the *Burlington* conditions upon B&O in the manner directed by the Administrative Law Judge is the appropriate means by which to protect those interests. From a financial point of view the immediate and principal beneficiary of the proposed acquisition is B&O. The only employees who can be adversely affected by the transaction are those presently employed by B&O. The *Burlington* conditions provide fair and reasonable protections, and B&O is more than able to carry the potential costs of employee protection.

With regard to the maintenance-of-way-levels condition adopted by the Administrative Law Judge and the mandatory collective bargaining directive requested by UTU, both of which would be imposed upon Prairie

Trunk, we believe that Prairie Trunk as a new operator should not be encumbered with Commission-imposed conditions in its initial dealings with its employees. Such conditions would subject Prairie Trunk to inequitable and unduly limiting standards which are particularly unnecessary when we consider that those employees who might be adversely affected by the transaction are adequately protected by standard employee protective conditions imposed upon and willingly assumed by a financially secure rail carrier. Accordingly, the maintenance-of-wage-levels condition will be removed and the mandatory collective bargaining directive will not be imposed.

The specific affirmative findings requested by Prairie Trunk to insure stability and avoid controversey merit some comment. To direct a continuation of existing through rates, routes, and divisions presently applicable to the Flora-Shawneetown line would require that those participating in the existing through rates, routes, and divisions be parties to the proceedings. This type of condition is similar to those described in *Detroit, T. & I. R. Co. Control,* 275 I.C.C. 455, 492-493, (DT&I conditions) which are usually imposed upon an applicant at the behest of other carriers who fear possible adverse effects from the transaction, cf. *Spokane Internationl R. Co. Control,* 295 I.C.C. 425, 434-436. The only carrier party to these proceedings is B&O whose obligations with regard to through rates, routes, and divisions constitute an integral part of its agreement with Trans-Action. The sole request for affirmative findings on this subject was made by applicant Prairie Trunk. They can have applicability only to B&O. In the face of B&O's contractual obligations, the requested affirmative findings would appear to be unnecessary and the possible source of confusion and controversy. They will not be entered.

Authorization for the assumption of all rights and obligations of B&O under its joint trackage agreement with L&N is inherent in our approval of the B&O assignment of its interest in the 5.36-mile segment of line owned jointly with L&N to Prairie Trunk.

We find no merit to protestants' objections to the positive environmental findings of the Administrative Law Judge in the initial decision of June 10, 1975. The proposed acquisition and the several other proceedings here under consideration contemplate a continuation of rail service over the same trackage. Hence our decision herein can properly be characterized as not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

The Control case. — As is clearly inferred from our previous discussion, we find that the control relationship contemplated between Trans-Action and Prairie Trunk and, in view of Trans-Action's control of Louisiana Midland, the control by Trans-Action of more than one common carrier by railroad will be consistent with the public interest. Although Trans-Action is a holding company, its economic activities are exclusively oriented toward railroad transportation. But for the fact that it is a separate corporate entity possessed of holding company status, Trans-Action would be subject to our jurisdiction as a common carrier by railroad. Under these circumstances and in view of the authorization herein for it to control two common carriers by railroad, we believe that Trans-Action should be subjected to the full impact of section 5(4)[22] of the act. Accordingly, pursuant to section 5(4) and as a condition of our approval of the control application, Trans-Action shall be considered a common carrier by railroad subject to sections 20(1) to (10) (which relate to reporting and accounting requirements) and 20a(2) to (11) (which relate to the issue of securities and the assumption of liabilities) of the act.

[22]Formerly section 5(3). Redesignated as section 5(4) pursuant to section 403)a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, 90 Stat. 63.

The Abandonment case. — In view of the B&O request for dismissal of its abandonment application in the event of a positive disposition of the Prairie Trunk acquisition proposal, our consideration of issues raised in the abandonment proceeding has been minimal. Nevertheless, we feel constrained to point out that the substance of the acquisition proposal is in direct conflict with the theory upon which the abandonment application is based and that in the face of the very real potential for traffic development on the Flora-Shawneetown line emphasized in the acquisition proceeding it would be extremely difficult for us to approve the abandonment proposal. Rather than proceed further in an analysis of the abandonment proposal, we will comply with B&O's request and dismiss its application for abandonment.

Ultimate Findings

In Finance Docket No. 27506, we find that subject to (1) the conditions for the protection of employees embodied in *Chicago, B. & Q. R. Abandonment,* 257 I.C.C. 700, responsibility and cost for which to be borne by the Baltimore & Ohio Railroad Company, (2) the placing by Trans-Action Associates, Incorporated, at the disposal of Prairie Trunk Railway of the sum of

$750,000 in cash or equivalent assets to be used for the purposes set forth in the application, and (3) the condition that for a period of 5 years from the date of consummation of the acquisition herein authorized, no abandonment application relating to the subject line of railroad may be filed by Prairie Trunk Railway prior to a bona fide offer of resale to any party to this proceeding at a purchase price no less favorable than the $500,000 to be paid to the Baltimore & Ohio Railroad Company for the acquisition, adjusted to Consumer Price Index changes, the present and future public convenience and necessity require the acquisition and operation by Prairie Trunk Railway of the line of railroad between Flora and Shawneetown, Ill., described herein, including all of the B&O interest in the 5.36-mile segment of line between Junction and New Shawneetown, Ill., jointly owned and operated by B&O and L&N.

In Finance Docket No. 27507, we find that the issuance by Prairie Trunk Railway of not exceeding 750,000 shares of no-par-value common stock with a stated value of $1 per share to Trans-Action Associates, Incorporated, for the purpose of financing the acquisition and operation of the line of railroad authorized to be acquired in F.D. No. 27506, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will of impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes; but that in all other respects, the application should be denied.

In Finance Docket No. 27728, we find that the acquisition by Trans-Action Associates, Incorporated, of

control of Prairie Trunk Railway upon the terms set forth and approved in F.D. No. 27506 and F.D. No. 27507, and subject to all of the conditions imposed therein, constitutes a transaction within the scope of section 5(2)(a) of the act, and will be consistent with the public interest; that this acquisition of control and Trans-Action's continued maintenance of control of Louisiana Midland Railway Company will be consistent with the public interest; and that if the transaction is consummated Trans-Action shall be considered a carrier by railroad within the meaning of section 5(4) of the act subject to the provisions of section 20(1) to (10), inclusive (relating to reporting and accounting), and section 201(2) to (11), inclusive (relating to the issuance of securities and the assumption of liabilities), of the act.

In Finance Docket No. 26965, we find that the application for abandonment should be dismissed.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate certificate and order will be entered.

APPENDIX A

Traffic handled by B&O over its Flora-Shawneetown Branch 1969-1975

Year	Number of carloads	Total tonnage	B&O revenues
1969	1,707	106,103	$392,977
1970	2,081	146,975	540,185
1971	1,705	111,899	478,149
1972	1,304	85,519	431,000
1973	1,162	74,306	505,000
1974	933	64,987	479,000
1975	876	65,236	548,000

APPENDIX B

Prairie Trunk projections as to traffic volume and grass freight revenues on the Flora-Shawneetown line

Type of traffic	Estimated freight carloadings by year					Carloads handled by B&O 1969-1971		
	Year 1	Year 2	Year 3	Year 4	Year 5	Future years	1969	1970	1971
Grain (farm products)	2,500	2,600	2,700	2,800	2,900	2,900	741	1,074	604
Sand and gravel	1,500	1,750	2,000	2,250	2,500	3,000	.....	.....	.....
Fluorspar	475	475	475	475	475	475	439	580	591
Fertilizer	250	250	250	250	250	250	240	241	263
Coal	.....	450	900	1,000	1,000	1,000	.....	.....	.....
Miscellaneous	200	200	200	200	200	200	287	186	247
Overhead	350	350	350	350	350	350	(1)	(1)	(1)
Total carloads	5,275	6,075	6,875	7,325	7,675	8,175	1,707	2,081	1,705

(1) Included within the other carload categories indicated

APPENDIX B—Continued

Estimated gross freight revenues by year
(000's omitted)

Type of traffic	Year 1	Year 2	Year 3	Year 4	Year 5	Future years
Grain	$205	$213	$221	$230	$238	$238
Sand and gravel	90	105	120	135	150	180
Fluorspar	59	59	59	59	59	59
Fertilizers	25	25	25	25	25	25
Coal	----------	45	90	100	100	100
Miscellaneous	20	20	20	20	20	20
Overhead	21	21	21	21	21	21
Switching and demurrage	10	10	10	10	10	10
Total	430	498	566	600	623	653

APPENDIX C

Prairie Trunk projected pro forma income statement
(000's omitted)

	Year 1	Year 2	Year 3	Year 4	Year 5	Future years
Gross revenues[1]	$445	$514	$583	$618	$641	$673
Railway operating expenses	322	344	406	425	430	431
Net railway operating revenues	123	170	177	193	211	242
Net rents, taxes, and fixed charges	131	134	137	139	142	149
Net railway operating income (loss)	(8)	36	40	54	69	93

[1]Including interest, rentals, and miscellaneous.

CERTIFICATE AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 17th day of February 1977.

FINANCE DOCKET No. 27506

PRAIRIE TRUNK RAILWAY – ACQUISITION AND OPERATION – BETWEEN FLORA AND SHAWNEETOWN IN CLAY, WAYNE, WHITE, AND GALLATIN COUNTIES, ILL.

FINANCE DOCKET No. 27507

PRAIRIE TRUNK RAILWAY SECURITIES

FINANCE DOCKET No. 27728

TRANS – ACTION ASSOCIATES, INCORPORATED – CONTROL – PRAIRIE TRUNK RAILWAY

FINANCE DOCKET No. 26965

BALTIMORE & OHIO RAILROAD COMPANY ABANDONMENT BETWEEN RINARD AND SHAWNEETOWN, IN CLAY, WAYNE, WHITE, AND GALLATIN COUNTIES, ILLINOIS

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report together with the report of the Administrative Law Judge in Finance Docket No. 26965 and the initial decision of the Administrative Law Judge in Finance Dockets Nos. 27506 and 27507 are referred to and hereby made a part hereof.

It is hereby certified, in Finance Docket No. 27506, that subject to the conditions stated in the report, the present and future public convenience and necessity require the acquisition and operation by Prairie Trunk Railway of a line of railroad between Flora and Shawneetown, Ill., as described in the report, including the assignment of interest in the 5.36-mile segment of line between Junction and New Shawneetown, Ill.

It is ordered, in Finance Docket No. 27507, that Prairie Trunk Railway be, and it is hereby, authorized to issue not exceeding 750,000 shares of its no-par-value common stock with a stated value of $1 per share to Trans-Action Associates, Incorporated, for the purposes and on the terms hereinbefore stated, and that in all other respects the application be, and it is hereby, denied.

It is further ordered, in Finance Docket No. 27728, that the acquisition by Trans-Action Associates, Incorporated, of control of Prairie Trunk Railway upon the terms and conditions set forth in the report, and the control by Trans-Action Associates, Incorporated, of Prairie Trunk Railway and Louisiana Midland Railway Company, two common carriers by railroad, be, and they are hereby, approved and authorized.

It is further ordered, That Trans-Action Associates, Incorporated, concurrently with consummation of the transactions herein authorized, pursuant to section 5(4) of the Interstate Commerce Act, shall be considered a carrier by railroad subject to section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act.

It is further ordered, in Finance Docket No. 26965, that the application be, and it is hereby, dismissed.

It is further ordered, That this certificate and order shall take effect and be in force from and after 35 days from its date of service.

It is further ordered, That Prairie Trunk Railway, when filing schedules establishing rates and charges applicable to the line, shall in such schedules refer to this certificate and order by date and docket number.

It is further ordered, That, except as herein authorized, the aforesaid stock shall not be sold, pledged, repledged, or otherwise disposed of by Prairie Trunk Railway unless or until so ordered or approved by this Commission.

It is further ordered, That nothing herein shall be construed to imply any guarantee or obligation as to said stock, or dividends thereon, on the part of the United States.

It is further ordered, That Prairie Trunk Railway shall report concerning the matters herein involved in conformity with the order of the Commission, by division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 1115.6).

It is further ordered, That, if the acquisition authority herein granted to Prairie Trunk Railway is exercised, applicants shall submit for the consideration of this Commission three copies of the journal entries required to record the transaction, and confirm in writing, to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, that pursuant to section 20a(3) of the act, the Commission may, from time to time, for

good cause shown, make such supplemental orders herein as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so authorized or the proceeds thereof may be applied.

And it is further ordered, That unless the transactions herein authorized are consummated within 180 days from the date hereof, this certificate and order as it applies to Finance Docket No. 27506, Finance Docket No. 27507, and Finance Docket No. 27728 shall be of no further force and effect.

By the Commission, Division 3.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX D
INTERSTATE COMMERCE COMMISSION

DECISION

[Service Date Oct. 13 1978]

No. AB-43 (Sub-No. 27)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN SEELY AND MANDE IN WILLIAMSON COUNTY, IL

FINANCE DOCKET NO. 28360

AMERICAN RAIL HERITAGE, LTD. – ACQUISITION AND OPERATION – OVER THE ILLINOIS CENTRAL GULF RAILROAD COMPANY LOCATED IN WILLIAMSON COUNTY, IL

DECIDED: October 10, 1978

On appeal, application to abandon a line of railroad in southern Illinois and acquisition of a portion of that line by American Rail Heritage, Ltd., granted in part, subject to conditions.

GRESHAM, *COMMISSIONER*

By application filed October 14, 1976, in No. AB-43 (Sub-No. 27) the Illinois Central Gulf Railroad Company (ICG), a common carrier by railroad subject to Part I of the Interstate Commerce Act (Act), proposes to abandon a line of railroad extending approximately 14.5 miles between Seely, IL, and Mande, IL, excluding Seely. By application filed April 4, 1977, as amended, American Rail Heritage, Ltd., doing business as Crab Orchard and Egyptian Railroad (COE), seeks authority pursuant to section 1(18) of the Act to acquire and operate a portion of the line proposed for abandonment in No. AB-43 (Sub-No. 27). COE seeks to operate 8.53

miles of the 14.5 miles of track to be abandoned by ICG between Ordill, IL and Mande, IL. The abandonment application is controlled substantially by section 1 of the Act in effect prior to the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210 (enacted February 5, 1976) (4 R Act), and by the abandonment regulations contained in 49 C.F.R. 1121 prior to the revision in Ex Parte No. 274 (Sub-No. 2), Abandonment of Railroad Lines and Discontinuance of Service.[1]

A public hearing was held at Marion, IL, on November 7 and 8, 1977. At the hearing testimony was received from applicants ICG and COE, and protestants the State of Illinois, Illinois Commerce Commission and various labor unions.

The initial decision, served March 31, 1978, recommended dismissal of that portion of ICG's application which was duplicated by COE's acquisition and a grant of the remainder of the abandonment. The initial decision further recommended that the COE acquisition be granted. The State of Illinois, the Illinois Commerce Commission and John W. McGinness and Winston C. Harbicht representing the United Transportation Union and Brotherhood of Maintenance of Way Employees, respectively, jointly filed an appeal (petition for ad-

[1]Section 1a(8) of the Interstate Commerce Act, created by section 802 of the 4 R Act states, "Petitions for abandonment or discontinuance which were filed and pending before the Commission as of the date of enactment of this section or prior to the promulgation by the Commission of regulations required under this section shall be governed by the provisions of section 1 of this Act which were in effect on such date of enactment, except that paragraphs(6) and (7) of this section shall be applicable to such petition." The subject regulations became effective November 10, 1976, well after the filing of the instant abandonment application.

ministrative review). Applicants have jointly replied to the appeal, and the parties subsequently filed supplements to their appeal and reply.

Our ultimate conclusions differ very little from those of the Administrative Law Judge. The facts stated in his decision, as modified and supplemented by our decision, are adopted as our own. They will not be restated except to the extent necessary for clarity of discussion.

PROCEDURAL MATTER

Initially we note that COE's supplement to the reply to the appeal includes a survey of shippers. This survey attempts to document the shippers' informed status concerning the effects on local rail service upon approval of COE's acquisition and its later inability to operate. Information of this sort is not properly admissible as it is neither verified nor offered at hearing which it would be subject to cross examination. Therefore, we will strike the survey from the record and it will not be considered.

DISCUSSION AND CONCLUSION

The parties raise the following issues: (1) whether the Judge erred in finding that the COE acquisition was properly filed under section 1(18) of the Act, rather than section 5(2), (2) in finding that the portion of the ICG application subject to the COE acquisition, representing 8.53 miles of track between Ordill, IL, and Mande, IL, should be dismissed, (3) in using improper standards in determining off-branch costing, (4) in finding that a one-time rehabilitation expense and rate of return were avoidable costs of providing service for a segment of line for which abandonment is sought, (5) by making in-

sufficient findings justifying abandonment of a portion of the line between Ordill, IL, and Seely, IL, (6) by not including any conditions for the protection of ICG employees concerning the segment of line to be acquired by COE, (7) by relying upon or accepting certain cost evidence which was improperly computed or accepted.

COE'S ACQUISITION APPLICATION

We will first address the allegation of error with respect to the Judge's recommendation to permit COE to acquire a portion of the trackage that ICG seeks to abandon. This application, docketed as F.D. 28360, was filed under section 1(18) of the Act.

The Congressional purpose in enacting section 5(2)(a) was to facilitate voluntary merger and consolidation in the national transportation system. *County of Marin v. United States,* 356 U.S. 412, 416-418 (1958). As indicated by the history of the legislation, Congress was much concerned with the survival of railroads that were in weak condition and with steps which might be taken to promote their continued existence. The great dependence placed on competition among railroads to invigorate our railroad economy was to be moderated where necessary for such survival. In the interest of maintaining and developing an economical and efficient transportation system, consolidation was made easier. See the appendix to *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U.S. 298, 315 *et seq.* (1954).

The provisions of section 5, complementary to section 5(2), further emphasize the Congressional preoccupation with the idea of survival of going concerns by the *unification* of two or more carriers in a common ownership or control (emphasis added). *Okmulgee Nothern Ry. Co. Abandonment,* 320 I.C.C. 637, 639 (1964).

On the other hand, section 1(18) was intended to deal with the abandonment, acquisition, and extension of an individual line of railroad and is essentially directed at transportation-oriented activities of a single rail carrier or applicant. *Prairie Trunk Railway – Acquisition and Operation,* 348 I.C.C. 832 (1977). Such authority under section 1(18) of the Act is necessary in order to operate a line of railroad in interstate or foreign commerce. See *Iowa Term. R. Co. Acquisition and Operation,* 312 I.C.C. 546 (1961).

In the instant proceeding, COE's application for acquisition is properly filed under section 1(18) of the Act. The intent is to acquire a portion of trackage and no unification of rail properties is contemplated. To require a carrier interested in a short segment of a line of rail to acquire such property pursuant to the provisions of section 5(2) might very well discourage it from acquisition, to the detriment of shippers. This would eliminate the prospect of continued service. *Okmulgee Northern Ry. Co. Abandonment, supra,* 641.

We do not feel that the substance of the acquisition proposal in this case conflicts with the theory upon which the abandonment application is based. COE plans to operate a local steam railroad service, transporting freight and passengers in tourist trade. The freight business of COE is expected to expand due to daily train operation and close cooperation with local industry in and near the city of Marion. Certainly, ICG unlike COE, is not disposed to utilize fully this segment of track and to implement and further the plans of the community to cultivate a tourist industry.

Under ICG's operation, income has declined to a point where inevitably operating losses will justify the lines abandonment and the cessation of all rail transpor-

tation to its dependent industries. The section of the line upon which the shippers are located can be operated profitably by COE by reason of the more attractive short-line service which will be offered to present and potential shippers as well as the more economical maintenance which it can perform because of more compact facilities at its command. The shippers, businessmen and towns along the involved line support the proposal of COE. This is a situation where a small locally owned and managed carrier would provide greater flexibility in scheduling and improved service.

Although abandonment authorization is not an essential prerequisite to approval of a section 1(18) acquisition proposal (*Prairie Trunk Railway — Acquisition and Operation, supra,* and *Iowa Term. R. Co. Acquisition and Operation, supra*), ICG's sought abandonment over the 8.53 miles of track involved in COE's application could nevertheless be considered on the merits. Each branch line of railroad must pay its own way and losses flowing from operation of unprofitable and unnecessary branch lines are inevitably a burden on interstate commerce, *New York Central R. Co. Abandonment,* 254 I.C.C. 745 (1944). The cost data submitted by ICG do not permit us to make this determination concerning the complete line of track running from Seely, IL, to Mande, IL. Our analysis precludes us from agreeing to the total abandonment but does not prohibit us from concluding that a portion of the line can be abandoned.

OFF BRANCH COSTING STANDARDS

Relevant to the issue of profitability of the line is a question of the use of the variable unit costing methodology for determining expenses beyond the line. Ex Parte No. 274 (Sub-No. 2), of which protestants

seek an interpretation, is not applicable to this proceeding which was pending prior to the date of enactment of those regulations. However, because all revenue generated by freight originating at or destined to points on the line is ultimately attributed to the line, the most accurate method for determining the expense of handling that traffic beyond the branch should be employed. *Northwestern Pacific R. Co. Abandonment,* 312 I.C.C. 783, 786-787 (1962). The 50 percent rule advocated by protestant and long permitted by the Commission as an acceptable indicator of off-branch costs where more complete and substantiated data were unavailable need not be arbitrarily imposed where such data are available. *Chicago, M., St. P.* and *P.R. Co. Abandonment,* 348 I.C.C. 749,752 (1976). Although the variable unit cost methods rely on system averages and cannot be said to provide an exact calculation of off-branch cost, the expense amounts so derived can be assumed to be more accurate than amounts ascertained through the mechanical application of the percentage formula based not on evidence of record, but merely upon prior Commission acceptance. *Baltimore and Ohio R. Co. Abandonment,* 354 I.C.C. 67 (1977).

The judge cited Ex Parte No. 274 (Sub-No. 2) in finding that applicant's use of variable unit cost was not improper. Implicit in the initial decision was his determination not to be bound by the new regulations, which are inapplicable to this proceeding, but rather to be guided by them as an expression of Commission approval of a particular off-branch costing methodology. Ex Parte No. 274 (Sub-No. 2) did not introduce guidelines which were not previously accessible to the applicant and we see no reason to reject the variable unit cost method.

AVOIDABLE COSTS

Using the recommended decision as a guide, the line as a whole was profitable to the extent of $58,548 in 1976. See Appendix C to the recommended decision. Rehabilitation to FRA Class I Standards was figured as costing $25,895. Total return on value of $64,345 was also considered by the Judge, and using this figure he determined that the line as a whole showed an avoidable loss of $31,692.

Protestants have vehemently objected to the consideration of rehabilitation expense to be covered in one year and rate of return as avoidable cost (also termed opportunity costs) of providing freight service in an abandonment proceeding. There seems to be some question as to the proper interpretation to be given opportunity costs in abandonment proceedings. In No. AB-20 (Sub-No. 3), *Texas & Pacific Railway Company — Abandonment Between San Martine and Rockhouse, In Colberson County, Texas,* the entire Commission by decision served July 27, 1978, found that the very same consideration presents an issue of general transportation importance. The proper interpretation of the use of opportunity costs in abandonment proceedings should be adjudicated in that proceeding.

In determining whether the present or future public convenience and necessity permit abandonment, the Commission has traditionally considered the role of rehabilitation expense in affecting profitability of a line sought to be abandoned. *Missouri-Kansas-Texas R. Co. Abandonment, OK,* 338 I.C.C. 728 (1971). However, this expense is a cost that should be capitalized over a period of years when considering its burden to the carrier.

When we give the proper consideration to rehabilitation expense as an avoidable expense and the uncertain weight, if any, to be attributed to rate of return, it would be improper to grant ICG's full line abandonment. There is no reason to hold our decision in abeyance pending a resolution of the treatment to be accorded rate of return. COE's acquisition of a portion of the line for which abandonment is sought would moot the issue of abandonment for that trackage. Therefore, we narrow the scope of our inspection to the remainder of the subject line for which abandonment is sought.

EVIDENCE PERMITTING ABANDONMENT OF A PORTION OF THE LINE

Protestants have objected that the evidence submitted was not sufficiently divisible to permit abandoment of the segment of line from Ordill, IL, to Seely, IL. We disagree.

In analyzing the substantive aspects of an abandonment, the Commission has the task of weighing the present and future need for the line of railroad (including the effect the abandonment would have on the community served by the line), against the future burden that would be imposed upon the carrier, its system, and interstate commerce, by continued operation. *Colorado* v. *United States,* 271 U.S. 153 (1926). Factors to be considered include, among others, the revenues that can reasonably be expected to arise from operation of the line, the financial ability of the carrier to continue operation over the line, the current levels of traffic moved over the line, and the traffic potential in the area involved. The availability of alternative means of transportation and cost of maintenance and rehabilitation of the line should also be considered. Weighing all the factors

presented in this proceeding, we conclude that the public convenience and necessity have been shown to permit the abandonment by ICG of the line of railroad extending from railway milepost 93.5 near Seely, IL, to milepost 99.47 at Ordill IL, a distance of 5.97 miles.

Of the 392 carloads handled over the total 14.5 miles of track during the 12 months ending June 30, 1976, the station at Ordill generated 103 total carlods of traffic with the station at Carterville, west of Ordill and located on the segment of line under discussion, generating 5 total carloads of traffic. The station at Ordill would be served by COE with the result that Carterville would be the only station left without rail service if the subject portion of the line is abandoned. Carterville is served by Illinois State Highway 13. Craneville, a small community without a railroad station on the subject line, would also be without service.

Carterville is approximately 9 miles from Carbondale, IL, via State Highway 13, and about 8 miles from Marion, IL, also by the same highway. This highway runs in an east-west direction across the State entering the eastern part of the State 6 miles east of Shawnee Town, IL. and connecting with State Highways 149 and 3 at Murphysboro and Grimsby, IL, on the west. In addition, Carterville is served by 7 certificated motor carriers. It seems evident that abandonment of the Seely to Ordill branch of the line would nevertheless leave Carterville and contiguous areas with a fine all weather highway system and adequate motor carrier service for the small amount of traffic that is present.

At the hearing there was undisputed testimony that the track near Seely is a mined out area where water stands at the edge of the tracks and the roadbed is deteriorating with water. Substantial work would have

to be done to stabilize the track. Also in the Seely to Ordill zone under discussion, there are numerous street crossings and a large highway crossing at Highway No. 13 that must be maintained.

When we weigh the public convenience and necessity measured by the condition of the track from Seely to Ordill against the traffic generated from that segment, one conclusion arises — that abandonment of this portion of the line should be permitted. Over this distance of 5.97 miles there are more than 20 grade crossings to be maintained, many requiring immediate care. Additionally, near Seely there is an area of track where there was previously strip mining, causing water to stand along the ties and at times between the rails. This again requires immediate attention. Against this substantial rehabilitation, we have a line that produced 5 carloads of traffic during a representative study period of 12 months.

The Commission has granted authority to abandon a line where needed rehabilitation expenses would generate losses on a line which has small prospects of increased traffic. Expensive rehabilitation of the line on which there would be no possible recovery of these increased losses would be an unnecessary burden on the applicant and on interstate commerce. We believe that the projected maintenance and rehabilitation of the Seely-Ordill portion would create such a burden, and thus abandonment of this portion of the line is warranted.

LABOR CONDITIONS

The recommended decision had imposed employee protective conditions as prescribed in *Oregon Short Line R. Co. — Abandonment — Goshen,* 354 I.C.C. 76

(1977), pertaining to the section of line to be abandoned between Seely and Ordill. We agree that the conditions are properly imposed as amended by our later decision in this same proceeding at 354 I.C.C. 584 (1978). However, we disagree that the conditions should be applied only to employees affected by the segment of track to be abandoned.

We feel that all employees who may be harmed by the proposed transaction should be protected. From a financial point of view, the immediate and principal beneficiary of the proposed acquisition by COE is ICG. The only employees who can be adversely affected by the transaction are those presently employed by ICG. The Oregon conditions, as amended, provide fair and reasonable protection and ICG is able to carry the potential costs of employee protection. *Prairie Trunk Railway — Acquisition and Operation, supra.*

We deem it unnecessary to encumber COE with Commission imposed conditions in its initial dealings with its employees as suggested in the supplement to the appeal. Such conditions would subject COE to inequitable and unduly limiting standards which are particularly unnecessry when we consider that those employees who might be adversely affected by the transaction are protected by conditions imposed and assumed by a financially secure rail carrier.

All other points raised and not discussed have been considered and found without merit.

We find that the evidence considered in light of the exceptions does not warrant a result different from that reached by the Judge, except concerning employee protective conditions. Statement of facts, conclusions, and findings of the judge, except as modified in this decision

are proper and correct in all material respects and are consistent with the applicable law. In Finance Docket No. 28360, we find that subject to the conditions for the protection of employees embodied in *Oregon Short Line R. Co. — Abandonment Goshen,* 354 I.C.C. 584 (1978), responsibility and costs for which to be borne by the Illinois Central Gulf Railroad Company, the present and future public convenience and necessity require the acquisition and operation by American Rail Heritage, Ltd., doing business as Crab Orchard and Egyptian Railroad, of the line of railroad between Mande and Ordill, IL, as described in this decision. In No. AB-43 (Sub-No. 27), we further find that subject to the same conditions for protection of employees as set forth in *Oregon Short Line R. Co. — Abandonment Goshen,* 354 I.C.C. 584 (1978), the present and future public convenience and necessity permit abandonment by the Illinois Central Gulf Railroad Company of its line of railroad, extending between Ordill and Seely, IL, also as described in this decision. We also find that the Judge's statements of facts, conclusions, and findings should be affirmed, as supplemented, and adopted as our own.

The parties are advised that this decision is administratively final under the provision of section 17(9)(c) of the Interstate Commerce Act. Any future administrative appeal can be entertained only under section 17(9)(d) of the Act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exists changed circumstances which would materially affect this decision. Such appeal must be filed within 20 days of the date of service of this decision.

It is ordered:

(1) The initial decision of the Administrative Law Judge served March 31, 1978, as modified in this decision in this decision, is adopted as the decision of the Commission, Division 1.

(2) The portion of applicants' supplement to the reply to the petition for administrative review concerning a survey of shippers is stricken from the record.

(3) This decision shall be effective 30 days from the date it is served.

By the Commission, Division 1, Commissioners Brown, Gresham, and Clapp.

H.G. HOMME, JR.
Acting Secretary

(SEAL)

Supreme Court, U. S.
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No. 79-1124

In the Supreme Court of the United States

OCTOBER TERM, 1979

PEOPLE OF THE STATE OF ILLINOIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals in the *Prairie Trunk* case (Pet. App. 1a-18a) is reported at 604 F. 2d 519. The opinion of the court of appeals in the *Crab Orchard and Egyptian* case (Pet. App. 21a-30a) is not yet reported. The decisions of the Interstate Commerce Commission (Pet. App. 32a-74a, 75a-88a) are reported at 348 I.C.C. 832 and 360 I.C.C. 45.

JURISDICTION

The judgment of the court of appeals in the *Prairie Trunk* case was entered on August 16, 1979 (Pet. App. 19a), and a petition for rehearing was denied on September 21, 1979 (Pet. App. 20a). On December 7, 1979, Mr. Justice Stevens extended the time for filing a

petition for a writ of certiorari in *Prairie Trunk* to and including January 19, 1980. The judgment of the court of appeals in the *Crab Orchard and Egyptian* case was entered on November 29, 1979 (Pet. App. 31a). The petition for a writ of certiorari in both cases was filed on January 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the circumstances of these cases, the Interstate Commerce Commission properly authorized a railroad carrier to acquire the line of another carrier pursuant to former Section 1(18) of the Interstate Commerce Act, instead of former Section 5(2) of the Act.

STATUTES INVOLVED

Former Sections 1(18) and 5(2) of the Interstate Commerce Act, 49 U.S.C. (1970 ed.) 1(18) and 5(2), are set forth in pertinent part at Pet. 3-5.

STATEMENT

This litigation arises from two separate proceedings before the Interstate Commerce Commission involving applications to abandon and acquire certain segments of railroad lines. Those applications were filed under former Section 1(18) of the Interstate Commerce Act, 49 U.S.C. (1970 ed.) 1(18).[1] Petitioners challenge the Commission's

[1]Former Section 1(18) was amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. No. 94-210, 90 Stat. 31) (the 4-R Act). That Act restructured Section 1(18) and deleted certain provisions relating to railroad discontinuances and abandonments. Congress later reenacted the Interstate Commerce Act as Subtitle IV of Title 49, United States Code (Pub. L. No. 95-473, 92 Stat. 1337). That recodification did not make any substantive change. See 92 Stat. 1466. Former Section 1(18), as recodified, will appear at 49 U.S.C. 10901.

holding that the abandonment and acquisition applications were properly processed under former Section 1(18).

1. *The Prairie Trunk Case*

In December 1971 the Baltimore & Ohio Railroad Company (B&O) filed an application for a certificate of public convenience and necessity under former Section 1(18) of the Act to abandon operations over a 73.27 mile line of track between Flora and Shawneetown, Illinois. A 5.36 mile portion of the track was owned and operated by B&O jointly with Louisville & Nashville Railroad Company. In February 1973 a Commission administrative law judge issued an initial decision recommending denial of the abandonment application (Pet. App. 2a-3a; 34a).

In October 1973 Prairie Trunk Railroad, a company organized for the purpose of purchasing and operating the 73.27 mile line of track, filed an application for a certificate of public convenience and necessity under former Section 1(18) that would permit it to purchase the line. B&O supported Prairie Trunk's acquisition application (Pet. App. 3a).

In September 1974 Trans-Action Associates, a non-operating holding company controlling a railroad, filed an application under former Section 5(2) to acquire corporate control of Prairie Trunk (Pet. App. 3a, 5a). Former Section 5(2) (recodified as 49 U.S.C. 11343) requires Commission approval for a holding company to acquire control of more than one carrier subject to the Commission's jurisdiction.

In June 1975 the administrative law judge approved Prairie Trunk's acquisition application subject to certain conditions, including the approval of Trans-Action's

application for authority to control Prairie Trunk and the imposition of the so-called *Burlington* employee protection requirements (see *Chicago, B. & Q. R.R. Co. Abandonment*, 257 I.C.C. 700 (1944)) (Pet. App. 4a-5a, 36a-37a).

The Commission adopted the administrative law judge's recommended decision (Pet. App. 32a-74a). It found that public convenience and necessity justified Prairie Trunk's acquisition of the 73 mile section of B&O track and approved Trans-Action's application for permission to assume control of Prairie Trunk. It also imposed the *Burlington* employee protection requirements as recommended by the administrative law judge.

In its decision, the Commission concluded that Prairie Trunk's application was properly considered under former Section 1(18) of the Act instead of former Section 5(2). The Commission explained (Pet. App. 60a-61a) (footnote omitted):

> On the basis of congressional intent we have found section 5(2) to be the appropriate provision for dealing with the unification of existing railroad enterprises, as in the case of consolidation or merger. *Okmulgee Northern Ry. Co. Abandonment, supra*, 639-640; see also *Tennessee Central Ry. C. Abandonment*, 334 I.C.C. 235, 245; and *Southern Ry. Co.-Control-Central of Georgia Ry. Co.*, 331 I.C.C. 151, 156-157. Section 1(18), on the other hand, is intended to deal with the abandonment, acquisition, and extension of an individual line of railroad and is essentially directed at the transportation-oriented activities of a single rail carrier or applicant; cf. *Okmulgee Northern Ry. Co. Abandonment, supra*, 639-640; and *Iowa Term. R. Co. Acquisition and Operation, supra*, 548-549. In its present

> condition Prairie Trunk stands as a noncarrier seeking to acquire a line of railroad. As a noncarrier it is not subject to section 5(2) and is only subject to 1(18) inasmuch as, upon approval of the acquisition, it proposes to conduct operations over the Flora-Shawneetown line. *Iowa Term R. Co. Acquisition and Operation, supra*, 548-549. The proposed acquisition does not contemplate merger or unification of existing rail enterprises, but rather is concerned with the simple acquisition of a line by a prospective new rail carrier. We are satisfied that section 1(18) rather than section 5(2) is the most appropriate provision to deal with the type of transaction herein pending.

The only application for permission to acquire control of a railroad company was Trans-Action's application to acquire Prairie Trunk as a wholly owned subsidiary. The Commission concluded that this application was properly filed and processed under former Section 5(2) of the Act (Pet. App. 66a-67a).

2. *The Crab Orchard and Egyptian Case*

In October 1976 the Illinois Central Gulf Railroad Company filed an application under former Section 1(18) to abandon a 14.5 mile railroad line between Seely and Mande, Illinois. In April 1977 American Rail Heritage, Ltd., doing business as the Crab Orchard and Egyptian Railroad, filed an application under former Section 1(18) to acquire 8.53 miles of the line to be abandoned by Illinois Central (Pet. App. 22a-23a).

Following a hearing and initial decision by the administrative law judge, the Commission granted COE's application to acquire the 8.53 mile segment of track, dismissed the duplicative portion of Illinois Central's

abandonment application, and approved the abandonment by Illinois Central of the remaining 5.97 mile portion of the line. The Commission also imposed on Illinois Central the employee protection requirements recently prescribed in *Oregon Short Line R.R. Co.-Abandonment-Goshen*, 354 I.C.C. 584 (1978) (Pet. App. 75a-88a).[2] As in the *Prairie Trunk* case, the Commission concluded that the Crab Orchard and Egyptian application was properly filed under former Section 1(18) rather than former Section 5(2) (Pet. App. 78-80a).

The court of appeals affirmed the decisions of the Commission in both cases (Pet. App. 1a-18a, 21a-30a).

ARGUMENT

The decisions of the court of appeals, on which we generally rely, correctly reject petitioners' contention (Pet. 10-17) that the Commission was required to consider the applications of the Prairie Trunk and Crab Orchard and Egyptian railroads under former Section 5(2) of the Act rather than former Section 1(18). Those decisions do not conflict with the decisions of this Court or any court of appeals. Further review by this Court is not warranted.

1. The Commission's decisions rest on the premise that former Section 1(18) was designed "to deal with the abandonment, acquisition, and extension of an individual line of railroad and [was] essentially directed at the transportation-oriented activities of a single rail carrier or applicant," while former Section 5(2) was "the appropriate provision for dealing with the unification of

[2]The 4-R Act requires the Commission to adopt in all cases protective conditions for the benefit of employees that are at least as beneficial as those previously required under former Section 5(2). See 49 U.S.C. 10903(b)(2). The *Oregon Short Line* conditions were developed by the Commission to satisfy that requirement. Those conditions were recently upheld by the Second Circuit. See *New York Dock Ry.* v. *United States*, 609 F. 2d 83 (1979). See also page 8, *infra*.

existing railroad enterprises, as in the case of consolidation or merger" (Pet. App. 60a). The court of appeals correctly concluded that this was a reasonable interpretation of the statute and consistent with prior Commission decisions (Pet. App. 8a-12a). The Commission's interpretation is also consistent with this Court's construction of Section 5(2). See, *e.g.*, *County of Marin* v. *United States*, 356 U.S. 412, 416-418 (1958); *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 315-321 (1954). Petitioners have cited no authority supporting their contrary contention.[3]

2. In any event, the question raised by petitioners is of no continuing importance in view of Congress' amendments to Section 1(18) under the Railroad Revitalization and Regulatory Reform Act.

[3]In the *Prairie Trunk* proceeding, the Commission noted an alternative and independent basis for relying on Section 1(18). Prairie Trunk was not a common carrier by railroad at the time of its application (Pet. App. 60a). As the court of appeals explained (*ibid.*), it has long been settled that Section 1(18) applies to proceedings in which non-carriers seek to obtain initial interstate operating authority. Petitioners do not dispute this principle or the fact that Prairie Trunk was not a carrier. Rather, they contend that the application must fall under Section 5(2) because it relates in part to certain joint trackage with another carrier over a 5.36 mile segment (Pet. 12, 17). As the court of appeals correctly held, however, this element of Prairie Trunk's intended new operation was *de minimis* and could "not compel proceeding under Section 5(2) in what was otherwise a Section 1(18) case" (Pet. App. 11a).

The court of appeals also noted that this alternative ground for utilizing Section 1(18) could apply to the Crab Orchard and Egyptian application as well. The only interstate operations of that company had been pursuant to an emergency order of the Commission permitting it to conduct operations for three months pending action on its application for permanent authority (Pet. App. 24a-25a).

As the court of appeals explained (Pet. App. 17a), the question whether the Commission should proceed under Section 1(18) or 5(2) is significant only with respect to the degree of employee protection that is required in connection with abandonment proceedings. The *Burlington* conditions, which the Commission generally imposed under Section 1(18) and which were imposed in *Prairie Trunk*,[4] often provided less protection to employees than the conditions imposed under Section 5(2). In the present circumstances, however, the difference between the conditions has no practical importance. As the court below noted (Pet. App. 17a), "[p]etitioners have made no argument that the *Burlington* conditions are inadequate to protect the interests of the affected employees."

In future cases, the 4-R Act will eliminate any difference between the protection afforded to workers under the two sections. That Act revises the employee protection standards applicable under Section 1(18) to require protection "at least as beneficial to [the] interests [of employees] as * * * [that] established under section 11347 [former Section 5(2)] of this title." 49 U.S.C. 10903(b)(2). The *Oregon Short Line* conditions were prescribed by the Commission after the enactment of the 4-R Act to govern both Section 1(18) and Section 5(2) proceedings (see note 2, *supra*). Thus, the employee protection issue in this case presents no question of continuing importance.

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[4]The *Burlington* conditions were imposed in *Prairie Trunk* because that case was finally decided prior to the time when the new *Oregon Short Line* conditions became applicable (Pet. App. 17a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Illinois Central Gulf Railroad Company ("ICG") and American Rail Heritage, Ltd., d.b.a Crab Orchard and Egyptian Railroad ("COE") submit this Brief in Opposition to the Petition for a writ of certiorari filed by Petitioners, People of the State of Illinois (William J. Scott, Attorney General), Illinois Commerce Commission, United Transportation Union (John W. McGinness and George B. Lee), Brotherhood of Locomotive Engineers (Donald L. Lindsey), and Brotherhood of Maintenance of Way Employees (Winston C. Harbicht).

The Petition herein embraces two decisions of the United States Court of Appeals for the Seventh Circuit, the "Prairie Trunk" case (Appendix A to the petition) and the "Crab Orchard and Egyptian" case (Appendix B to the petition). The respondents herein are directly interested in the "Crab Orchard and Egyptian" case, and only indirectly in the "Prairie Trunk" case. The primary focus of this brief is therefore on the former case.

OPINIONS BELOW

The Opinion of the Court of Appeals in the "Crab Orchard and Egyptian" case is found in Appendix B to the petition, pp. 21a-30a. The decision of the Interstate Commerce Commission in the same case is found in Appendix D to the petition, pp. 75a-88a.

JURISDICTION

The jurisdiction of the Supreme Court is conferred by 28 U.S.C. 1254(1), following the entry of the opinion and orders of the United States Court of Appeals for the Seventh Circuit.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission properly held that COE could acquire and operate an individual line segment formerly operated by ICG under section 1(18) of the Interstate Commerce Act (49 U.S.C. 1(18), recodified 49 U.S.C. 10901 ff.).

2. Whether the Interstate Commerce Commission afforded proper labor protective conditions to the employees of the carrier relinquishing the operation of the line segment.

STATEMENT OF THE CASE

The proceeding before the Interstate Commerce Commission in the "Crab Orchard and Egyptian" case involved two applications; one by Illinois Central Gulf (ICG) in Docket AB-43 (Sub. No. 27) to abandon its line between Seely and Mande, Illinois, a distance of 14.5 miles; and the second by American Rail Heritage (COE) in Finance Docket 28360 to acquire and operate a portion of the ICG line sought to be abandoned, a distance of 8.53 miles, between Ordill and Mande. All points are in Williamson County, Illinois.

ICG is a major railroad operating in the middle west and middle south, and it has been subject to regulation by the Interstate Commerce Commission since the inception of that agency in 1887. Prior to the applications herein, COE had not engaged in interstate commerce. It had, for a time prior thereto, operated a tourist steam excursion train in Williamson County, Illinois. The tourist train operation was local in nature and did not involve any interstate transportation of persons or property.

The Interstate Commerce Commission held a hearing in Marion, Illinois (Williamson County) and granted the COE application to acquire and operate the 8.53 miles of line, in and near Marion. This application was strongly supported by numerous local interest, including the City

of Marion and local shippers and receivers of freight. The application was opposed only by the petitioners here—the Illinois Attorney General, the Illinois Commerce Commission, and several labor union officials of the unions, representing ICG's scheduled employees. The Commission dismissed ICG's abandonment application as to the 8.53 miles between Ordill and Mande, and granted the ICG application to abandon the remaining 5.97 miles between Seely and Ordill (see sketch map, petition, p. 27a).

The acquisition authority granted to COE was restrained by the Court of Appeals for a short time, but the Court subsequently vacated its restraining order. The acquisition of the 8.53-mile segment was consummated in mid-1979. The Commission has recently issued a certificate permitting ICG to abandon the remaining line segment, which is effective on May 9, 1980. ICG is in the process of filing tariff schedules to effect the abandonment on that date. Actually, there has been no train operations over this segment for several years because of an embargo for track safety problems. In approving this entire transaction, the Commission provided generous labor protective conditions for ICG employees who might be adversely affected by the granting of the applications. For all practical purposes, therefore, the entire transaction is complete, and there is no remaining controversy to be resolved.

ARGUMENT

I.

THE COMMISSION AND THE COURT OF APPEALS PROPERLY CONSIDERED THE APPLICATION OF SECTIONS 1(18) AND 5(2) OF THE INTERSTATE COMMERCE ACT.

Sections 5(2) and 1(18) of the Interstate Commerce Act (prior to the recent recodification) were enacted as part of the Transportation Act of 1920. The latter Act gave to the Interstate Commerce Commission sweeping regulatory power over the financial structure of railroads. The 1920 Act regulated for the first time railroad mergers and unifications, extensions and abandonments of lines, the issuance of securities, divisions of revenues, and other matters affecting in the ultimate sense the cost to the carriers and to the public of railroad service. Section 5(2) of the Interstate Commerce Act focused on unifications and mergers of rail carriers. *County of Marin v. United States*, 356 U.S. 412 (1958); *St. Joe Paper Co. v. Atlantic Coast Line Railroad Co.*, 347 U.S. 298 (1954). Sections 1(18)-1(22) of the Act regulated the construction, acquisition, and abandonment of individual lines of railroad. *Colorado v. United States*, 271 U.S. 153 (1926). The recodified Interstate Commerce Act retains this distinction: Sections 10901 ff. (49 U.S.C.) deal with construction, acquisition, and abandonment of individual lines of railroad, while Section 11343 deals with mergers, unifications, joint operations and trackage rights (see petition, pp. 3-5).

The Interstate Commerce Commission has for many years considered applications to acquire and operate small segments of railroads under Section 1(18). The leading precedents are *Okmulgee Northern Ry. Co.*

Abandonment, 320 I.C.C. 637 (1964) and *Iowa Terminal R. Co. Acquisition and Operation*, 312 I.C.C. 546 (1961). The history of this interpretation was discussed by the Commission at some length in its decision (petition, pp. 78a-80a). It was also discussed in *Prairie Trunk Railway-Acquisition and Operation*, 348 I.C.C. 832 (1977); see petition, p. 60a. The *Prairie Trunk* decision is consistent with a long history of statutory interpretation and thus breaks no new ground. It was thus consistent for the Commission in the "Crab Orchard and Egyptian" case to rely upon its more recent *Prairie Trunk* decision as well as the older precedents in granting COE's application to acquire and operate a short segment of rail line in Williamson County, Illinois. The Court of Appeals for the Seventh Circuit recognized and approved the Commission's interpretation and application of these statutory provisions. A long and settled statutory construction by the agency charged with the administration of the law is entitled to great weight: *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973).

II.

THE IMPOSITION OF LABOR PROTECTIVE CONDITIONS SATISFIES THE REAL INTERESTS OF PETITIONERS.

A further issue is that of labor protection. The former Section 5(2) of the Interstate Commerce Act mandated the protection of labor in the Commission's order granting any approvals under that section; former Section 1(18) did not mandate labor protection, but the Commission has routinely and consistently applied labor protective conditions in such cases. In the "Crab Orchard and Egyptian" case, the Commission applied protective conditions to all ICG employees who might be adversely

affected by the abandonment and acquisition authorized in the proceeding (petition, pp. 85a-86a). Similarly, labor protective conditions were imposed in the "Prairie Trunk" case (petition, pp. 61a-62a). Thus, the employees of ICG (Crab Orchard and Egyptian case) and of B&O (Prairie Trunk case) actually received the protective conditions that would have been mandatory had the applications been considered under Section 5(2). Thus, the labor protection point is a moot one. Since most of the petitioners here are labor union officials, the Court should deem their interests in this matter satisfied by the protective conditions afforded by the Commission. The interests of the Illinois Attorney General and of the Illinois Commerce Commission have appeared throughout this proceeding identical to those of the labor union officials, as they took positions contrary to the expressed views of the City of Marion and of the local affected shippers and receivers of freight in and near Marion. Thus, the interests of all petitioners in obtaining labor protective conditions have in fact been satisfied by the orders of the Commission.